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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-395

In re Applications of

MEREDITH CORPORATION	File No. BPCT-850827KE
WEST FLORIDA TELEVISION LIMITED	File No. BPCT-850828KQ

For Construction Permit
for a New Television Station
Inverness, Florida

Appearances

Henry A. Solomon and *James E. Dunstan* on behalf of Meredith Corporation; *Robert Kelly*, *Amy R. Heyman*, and *John P. Bankson, Jr.* on behalf of West Florida Television Limited; *Michael J. Wilhelm* on behalf of Wabash Valley Broadcasting Corporation, Intervenor; and *Jerry Hermele* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOSEPH P. GONZALEZ

Issued: August 31, 1988; Released: September 12, 1988

1. By *Hearing Designation Order* (HDO) released on January 7, 1986 (Mimeo No. MM 1789), the applications of Nancy Sharp, Meredith Corporation (Meredith), Lonny Walters Partnership, and West Florida Television Limited (West Florida) for a permit for a television broadcast facility on Channel 64 in Inverness, Florida were designated for a comparative hearing. After noting that Meredith alone among the various applicants proposed a satellite operation, the Commission designated in the aforementioned *Order* the following issue:

> To determine, with respect to Meredith Corporation whether circumstances exist which would make operation as a "satellite" or "primarily a satellite" necessary for Inverness, Florida.

2. The application of Lonny Walters Partnership (File No. BPCT-850828KE) was dismissed with prejudice for failure to prosecute by *Memorandum Opinion and Order*, FCC 86M-1954, released on June 16, 1986, and by *Memorandum Opinion and Order*, FCC 86M-2962, released on October 1, 1986, the application of Nancy Sharp (File No. BPCT-850708KG) was also dismissed with prejudice as a result of a grant of the "Joint Petition for Approval of Settlement Between Nancy Sharp and West Florida Television Limited" filed by Nancy Sharp and West Florida on September 5, 1986. The remaining applicants, Meredith and West Florida, also seek approval of a settlement agreement which provides, in pertinent part, for the dismissal of the West Florida application in return for a cash payment by Meredith to West Florida of 1,027,500.00 dollars. The agreement also includes a provision for a consulting arrangement between the two parties whereby West Florida agrees to provide consulting and advertising services to the management of the Inverness facility in return for a further cash payment by Meredith. Contemporaneously with the filing of the joint motion, Meredith seeks, pursuant to a separately filed motion, summary decision in its favor of the satellite issue referenced above. Big Sun Television, Inc. (Big Sun), Wabash Valley Broadcasting Corporation's predecessor as licensee of station WBSP-TV, Channel 51, Ocala, Florida, sought and was granted leave to intervene for the sole purpose of adducing evidence relevant to the satellite issue designated against Meredith *(see, Order* released on July 25, 1986 (FCC 86M-2387)), and by the same *Order*, was granted leave to submit an economic study in opposition to Meredith's motion for summary decision. The *Order* further granted Meredith leave to respond to that study. Big Sun's pleading submitted in opposition to the motion for summary decision includes an economic study by Charles H. Kadlec of the firm of Frazier, Gross & Kadlec, Inc. (the Kadlec study), and Meredith's response consists primarily of an economic viability study prepared by Susan D. Harrison (the Harrison study). The Commission's Mass Media Bureau (Bureau) also filed comments in opposition to Meredith's motion for summary decision.

3. After careful consideration of the opposition statements submitted by both the Intervenor and the Bureau and Meredith's reply thereto, the Presiding Judge concluded that Meredith had demonstrated that a full service television broadcast facility at Inverness was not economically feasible, and that summary decision in its favor of the satellite issue was, therefore, warranted. *See, Memorandum Opinion and Order*, FCC 86M-3173, released October 27, 1986. By *Memorandum Opinion and Order*, FCC 86M-3174, released contemporaneously with the aforementioned MO&O, the Presiding Judge approved the settlement agreement submitted by Meredith and West Florida, dismissed West Florida's application with prejudice, and granted Meredith's application for a satellite operation on Channel 64 in Inverness, Florida. Big Sun, henceforth referred to by the name of its successor-in-interest, Wabash Valley Broadcasting Corporation (Wabash), filed an appeal with the Commission's Review Board on November 26, 1986 in which it argued that sufficient disputed facts remained for resolution with respect to the satellite issue, and that the Presiding Judge's grant of summary decision of that issue was an error.

4. The Review Board, by *Memorandum Opinion and Order*, FCC 87R-34, released on July 2, 1987, granted Wabash's appeal and remanded the case for evidentiary hearing on the satellite necessity issue. Although it found Meredith's economic study to be ". . . facially . . . more persuasive than the Kadlec study and, if so proven, especially given the small size of Inverness and its environs, Commission precedent would support a finding of satellite necessity.", [citing *Pete J. Stathakas*, 59 RR 2d 169 (1985), *Capitol Broadcasting Co.*, 54 RR 2d 811 (1983), and *W. Russell Withers, Jr.*, FCC 87-189, released June 10, 1987], it went on to state that it "cannot now find that Meredith

has satisfied the *legal standard* to support the extraordinary procedure of *summary decision*, to wit: that 'there is no genuine issue as to any material fact.'"

5. Although the Review Board called for additional comments from the parties with respect to their conflicting studies in the hope of avoiding the necessity for a remand, after reviewing this additional material the Board concluded that significant factual questions remain that should be resolved through the "crucible of an evidentiary hearing, at which *the expert witnesses* [emphasis supplied] can be cross-examined and their hypotheses tested."; and that the ultimate result as to whether or not a satellite operation is a necessity for the Inverness facility " . . . should then be decided based on an overall weighing of evidence by the trier-of-fact." In remanding the proceeding, the Review Board noted that the Presiding Judge would have to revisit the proposed settlement agreement since it provides, as a condition precedent to payment, that Meredith be granted authority to operate as a 100 percent satellite facility.

6. The Review Board's remand order was read by the Undersigned as calling for a limited evidentiary hearing at which each party would be provided with the opportunity to cross-examine the opposing party's expert witness. The remand order was released on July 2, 1987 and hearing sessions were held on January 25, 26 and 27, 1988. The Parties had in excess of a year to study each other's economic study, and almost six months after the release date of the Review Board's remand *Order* to prepare themselves for their cross-examination of each other's expert. In the case of the Harrison study, the cross-examination of Ms. Harrison lasted for almost two full days. In examining Ms. Harrison with respect to the methodology employed in preparing her Inverness, Florida study, counsel for Wabash was permitted to ask questions as to the methodology she employed in an earlier study of a broadcast facility at Ocala, Florida (hereinafter referred to as the Ocala study) which she prepared while employed by Frazier, Gross & Kadlec, Inc. Leave was granted for such an examination for the sole purpose of determining whether or not the procedures employed by Ms. Harrison in the Inverness study departed significantly from those used in the earlier Ocala study, on the theory that such a departure would have a bearing on the overall credibility of the Inverness study. Similarly, Mr. Kadlec was cross-examined as to the procedures he followed in earlier economic viability studies submitted to this Commission. The discussion set forth below, therefore, will not concern itself with the merits of those earlier studies, but merely the methodologies employed in preparing them.

7. Proposed Findings of Fact and Conclusions of Law were filed by West Florida, Meredith, Wabash, and the Mass Media Bureau, and replies thereto were filed by the Mass Media Bureau, Meredith, and Wabash.

8. On April 5, 1988, the Mass Media Bureau filed a motion to strike portions of Meredith's reply statement to which Meredith filed an opposition statement and Wabash filed comments.

9. The Bureau requests that paragraphs 11-12 and Footnote 5 of Meredith's reply statement be stricken on the basis that there is no record evidence to support the statements set forth therein. The Presiding Judge finds good cause for granting the motion and it will be so ordered.

FINDINGS OF FACT

10. It is undisputed that the community of license assigned to Channel 64 is a small one. The 1980 United States Census reports that Inverness has a total population of only 4,095 persons. Its home county of Citrus has, according to the same source, only 54,703 persons resident within its boundaries, while its neighboring county of Marion has a population of only 122,488 persons. Both counties had a total 1986 population of 248,948 (Meredith Exh. 1, App. A at p. 9, Table 1). The Grade B contour area to be served by Meredith from its proposed facility at Inverness is described by all parties as essentially "rural" in nature. *See*, for example, the Bureau's comments on page 30 of its Proposed Findings of Fact and Conclusions of Law. Although the population of the Inverness station's Grade B service area is relatively small, it is projected that the population of this area of west central Florida will grow by 3.7 percent a year through 1991 (Meredith Exh. 1, App. A at p. 9, Table 1) for an annual growth rate for the area exceeding the national average of 0.9 percentage points (Meredith Exhibit l, App. A at p. 10, Table 2), and the number of households will increase at a slightly higher rate of 4.9 percent a year. Retail sales will grow by 12.4 percent, a figure higher than the 9.1 percent total growth rate for the United States (Meredith Exh. 1, App. A at pp. 11-12, Tables 3 and 4). However, retail sales per household are not expected to keep pace with the forecasted national averages (Meredith Exh. 1, App. A at pp. 11-12, Tables 3 and 4).

11. Inverness is located in the Tampa-St. Petersburg (Tampa), Florida Area of Dominant Influence (ADI). The area to be served by Meredith's proposed Inverness facility also includes portions of the Orlando-Daytona Beach-Melbourne (Orlando) and Gainesville ADI(s), but not the principal cities of Tampa, Orlando and Gainesville, Florida (Meredith Exh. 1, App. A at p. 3). A total of 13 commercial stations, including five independent stations and eight network affiliated stations, serve the Inverness station's service area. Of the five independents, stations WBSP, Ocala, Florida and WIYE, Leesburg, Florida are located within 35 miles of Inverness (Meredith Exh. 1, App. A at pp. 13-14). Of the total number of 13 commercial stations serving that area, five are located in the Tampa ADI and are collectively viewed by 68 percent of the residents of Citrus County, and six are located in the Orlando ADI and are viewed by 69 percent of the residents of Marion County (Meredith Exh. 1, App. A at pp. 15-16). In addition, the area is served by in excess of 40 AM and FM stations, including 10 stations licensed to the Channel 64 service area (Meredith Exh. 1, App. A at p. 17, Table 7 at p. 19). Cable penetration in the projected service area in 1985-86 was 51 percent, slightly higher than the national average of 48 percent, and in Citrus County 44 percent and Marion County 55 percent (Meredith Exh. 1, App. A at pp. 17-18, Table 8 at p. 20).

12. The issue at hand is whether or not a satellite operation for Inverness is an economic necessity. The Harrison and Kadlec studies, although they reach different conclusions, employ in a number of instances like methodologies and make a number of similar assumptions. For example, Ms. Harrison ruled out network affiliation for the new broadcast facility at Inverness (Meredith Ex. 1, App. B at pp. 1-2) and Mr. Kadlec assumed that the station would operate as a full service independent; neither expert assumed a religious, music or foreign language format for the television station (Meredith Exh. 1, App. A

at p. 2; Wabash Exh. 4). In addition, both proceeded on the assumption that an independent station at Inverness would have to rely for the most part on local advertising for its revenues (Meredith Exh. 1, App. A at p. 3; Wabash Exh. 4, p. 11). Neither expert visited Inverness in preparing their respective studies and neither contacted specific businesses within the area (Tr. 296-97, 303- 08, 490-91). Both Ms. Harrison and Mr. Kadlec relied solely upon published statistical data concerning the Inverness area, and they both used data concerning advertising revenues for other markets found to be of similar size in predicting likely revenues for the Inverness station. Neither study assumed nor predicted the creation of a new, separate ADI at Inverness, Florida.

13. The most significant difference by far between the two economic studies is each expert's definition of the size of the potential market for an independent, full service station in Inverness. Harrison estimates that 90 to 95 percent of the station's revenues would be expected to come from its home county of Citrus and the neighboring county of Marion and between 5 and 10 percent from advertisers located at other points within the station's Grade B service area (Tr. 241-42, 303). Kadlec assumes a market co-extensive with the station's Grade B contour and he considers the entire area equally as a likely source of revenues (Wabash Exh. 4, p. 9). As a result, Harrison's projected market size is considerably smaller, consisting of only 103,162 households whereas Kadlec's totals 192,000 households.

14. Another significant difference between the two studies was Mr. Kadlec's failure to include any cost projections for the facility, although he testified that he was given sufficient time to prepare a complete study (Tr. 519). Mr. Kadlec's failure to do so constitutes a significant departure from his usual practice in preparing feasibility studies submitted to this Commission (Tr. 456), and his failure to do so has not been adequately explained. It appears inconceivable to the undersigned that an expert would be willing to conclude that a station would be economically viable without considering the costs of the construction and the operation of the station before reaching such a conclusion. His failure to do so and yet still arrive at such a conclusion raises serious questions as to his methodology as well as the weight, indeed even the credibility to be accorded his ultimate conclusion; namely that a full service facility at Inverness, Florida would be economically viable.

15. In arriving at her estimate of potential revenues for the Inverness station, Ms. Harrison looked to the amount of retail sales and the number of television households for each of the ten smallest ADI(s) for which revenue information was available for 1980 and 1984 on the theory that an individual market's figures for total retail sales and number of television households can be used in arriving at a predicted figure of television revenues for a proposed station in a similar market. Ms. Harrison chose the ten smallest ADI(s)[1] as the peer group for the Inverness facility because of the small size of her projected market for Channel 64. Ms. Harrison indicates, however, that everyone of these markets within the peer group is considerably larger than her projected market for the Inverness facility, and that any estimate as to that station's service area revenues would, therefore, be considerably overstated (Meredith Exh. 1, App. A at p. 24). The data for gross local television revenues for 1980 and 1984 for these stations was gathered from the NAB's "Television Market Analysis". These figures were then divided by (1) the number of ADI television households and (2) the dollar volume of ADI retail sales. Ms. Harrison found that the average peer market in 1980 generated 25.29 in gross local television revenues for every television household in the ADI; and that for every 1,000.00 of retail sales generated in the average peer group ADI, about 1.94 was spent in 1980 on gross local television advertising. After factoring out the lowest and highest figures, she arrived at 23.56 for television households and 1.83 for retail sales for 1980. The figures for 1984 using the same methodologies are 35.94 for local revenues for television households and 2.19 for every 1,000.00 of retail sales. Again, after factoring out the high and low figures, the amounts for 1984 are 36.90 for local revenues for television households and 2.24 for revenues for every 1,000.00 of retail sales generated in the average peer group ADI. On the basis of the figures for 1980 and 1984 as set forth above, Ms. Harrison arrived at a growth rate for the peer group of 3.1 percent for local time sales per 1,000.00 retail sales and 9.2 percent gross local time sales per television households. Again, after excluding the high and low figures, she arrived at the following growth rates: 5.2 percent for local time sales per 1,000.00 retail sales; and 11.9 percent for gross local time sales per television households (Meredith Exh. I, App. A at p. 29, Table 11). In arriving at her revenue projections for the Inverness market, Ms. Harrison used the higher growth rate figures, although she believes that they substantially inflate the growth potential of the Inverness market since they incorporate the high inflation being experienced at the time, and, additionally, are derived from a peer group consisting of markets much larger than that assigned to Inverness. These growth rate figures were then applied to the number of projected households and the amount of retail sales in her projected service area for the Inverness facility. The two techniques, that is, the television per retail sales approach and the revenues per household approach, provided somewhat different estimates of market revenues, and in order to arrive at an estimate of market revenues available to Channel 64, the revenue estimates derived from these two approaches were averaged out and a 50 percent development factor was applied. Ms. Harrison defines this "factor" as reflecting the inability of "a very small, two-independent-UHF station service area to generate revenues on a par with established ADI(s) in which three VHF network affiliates are competing." (Meredith Exh. 1, App. A at p. 26.) On the basis of her analysis, Ms. Harrison estimates that revenues for the Inverness market will grow from nearly 2.4 million in 1987 to 4.6 million in 1991, or a growth rate through the period of 17.80 percent (Meredith Exh. 1, App. A at p. 26).

16. In arriving at a market share for the facility at Inverness, Ms. Harrison proceeded on the bases that a television station's share of market audience depends on (1) whether it is a network affiliate or an independent; (2) its programming offerings; (3) its technical facilities and signal coverage area; (4) the skill and experience of its management; and (5) the number and type of competing media (Meredith Exh. 1, App. A at p. 33). Considering these factors and assuming that the station would offer a competitive programming schedule, Ms. Harrison assigned the Inverness facility a market share of 5.5 percent. She considers this to be a generous figure in view of the fact that the first independent serving the area generates only a 5 percent weighted average share in the two-county area, and that in her experience, a second or third independent

in the market rarely reaches parity with the first station to enter the market. Additionally, according to Ms. Harrison, an increase in the number of television stations serving the area will make the market more competitive and place a downward pressure on the Inverness facility's audience share (Meredith Exh. 1, App. A at p. 34). By taking into consideration the inventory advantage and pricing flexibility which she believes that independent stations possess, Ms. Harrison projects a 30 percent premium for the station's revenues. The application of this 30 percent advantage to the Inverness station's 5.5 percent audience share yields a revenue share of 7.2 percent. Accordingly, she estimates net revenues for the station of 79,000.00 for 1987, by 1988, after one and a half years of operation, 134,000.00, and by 1991, approximately 335,000.00 (Meredith Exh. 1, App. A at pp. 35-36).

17. Based on NAB data and information from other sources, Ms. Harrison estimates that it would cost between 3.6 and 4.4 million dollars to construct a full service independent station at Inverness, Florida (Meredith Exh. 1, App. A, Table 19 at p. 47). Expenses for operating the station for 1988, the station's first full year of operations, would total, according to Ms. Harrison, approximately 2.144 million and by 1991, 2.5 million (Meredith Exh. 1, App. A, Table 18 at p. 42). After considering her revenue projections for the station, Ms. Harrison estimates that the Inverness facility would show a pre-tax, pre-interest and pre-principal payment negative operating cash flow for the first six months of operations of over 1.8 million: this figure is estimated to increase to about 2.2 million in 1991 (Meredith Exh. 1, App. A at p. 39). On the basis of these figures, Ms. Harrison concludes that there is no likelihood for the foreseeable future of an economically viable base for a full service station at Inverness, Florida (Meredith Exh. 1, App. A at p. 22).

18. Mr. Kadlec's study assumes an Inverness market encompassing the proposed facility's entire Grade B contour for a total of 192,000 television households in 1985, and a uniform distribution of households within that area (Wabash Exh. 4, p. 1; Tr. 434). With this number of households in mind, Mr. Kadlec assigned the Inverness market a hypothetical ADI ranking of 111, and he then designated the ten ADI(s) ranked immediately below and above the Inverness ranking of 111 as peers of that market. Mr. Kadlec gathered the data as to the revenues for these markets and then divided those figures by the dollar volume of ADI retail sales and the number of television households. Based on this data, he concludes that for every 1,000 dollars of retail sales generated in a market of this size, approximately 3.22 was spent on local television advertising with every household in the ADI generating 46.39 year in local television revenues. By applying an average of the ratio of revenues per television household and the ratio of revenues to retail sales, Mr. Kadlec estimates a local television market revenue for Inverness of 9.4 million in 1985, and by increasing this figure by 9 percent a year, he concludes that 12.2 million dollars in television market revenues would be available within the Inverness market by 1988 (Wabash Exh. 4, pp. 11- 12). After applying discounts for developmental factors, Mr. Kadlec estimates that the proposed facility at Inverness would capture approximately 20 percent of that gross revenue figure (Tr. 495-496) or revenues of nearly 2.0 million in 1988 which, he believes, supports a finding that a full service independent station serving the Inverness market would be economically viable (Wabash Exh. 4, pp. 11-13).

19. In order to further support his finding of the economic viability of a full service independent station at Inverness, Mr. Kadlec examined 15 markets with revenues similar to those projected for Inverness. He notes that each ADI supports three to five full service television stations, for a total of 53 stations in the 15 markets; and that four markets possess one independent, and two markets have two independents. On the basis of this information, he concludes that a revenue base comparable to that projected for Inverness successfully supports full service independent television stations in similar markets (Wabash Exhibit 4, p. 13).

20. Although Mr. Kadlec did not address the costs of the construction and the operation of the station in his written study, he testified, under cross-examination, that the Inverness station could be constructed for between 2,500,000 and 3,000,000 dollars and operated for a year for 1,500,000 dollars (Tr. 500-502); although he indicated that he was not comfortable with these figures (Tr. 501). Mr. Kadlec assumed that the station would operate 18 hours a day, have a local studio, and employ a staff of 35 to 40 full-time and part-time people (Tr. 459-60).

CONCLUSIONS

21. Resolution of the issue as to whether or not an economic necessity exists for a satellite operation at Inverness depends on the weight to be accorded the conclusions reached by the Kadlec and Harrison studies, both of which were the subject of extensive cross-examination. Although the Bureau in its proposed findings posits what amounts to yet a third economic analysis of the Inverness market, consisting of findings taken from both the Harrison and Kadlec studies, the Bureau's "study" is not evidence in this proceeding which has been sponsored by an expert witness and subjected, in the Review Board's words, to the crucible of cross-examination. The Parties to this proceeding have commented on the Bureau's "study". However, the Presiding Judge considers it to be beyond the scope of this examination, and no further consideration will be given to the Bureau's economic model. The conclusions set forth below will relate solely to the findings and conclusions set forth in the Harrison and Kadlec studies.

22. As noted above, Mr. Kadlec's projected market for the Inverness facility includes all households which fall within the station's Grade B service area. His revenue projections for Channel 64 are based on revenue figures drawn from a peer group of stations with approximately the same number of households within their respective ADI(s). However, there has been no showing that these peer ADI(s) encompass within their ADI(s) all the households served by these facilities. His comparison between an ADI based on all households served and the traditional ADI is, therefore, faulty, since, in the case of Inverness, he assumes that all households served by Channel 64 would fall within its area of dominant influence, a departure from the traditional approach of looking to the dominant market center for a particular area; a position which the Commission rejected in *Pete J. Stathakas*, 59 RR 2d 169, 174 (1985), recognizing that households within a Grade B service area may very well be in separate markets; a

situation which clearly applies to the Inverness station's Grade B contour area which is served by three existing ADI(s), each with an established market within that area.

23. The Bureau argues, nevertheless, that the Kadlec definition of the Inverness market is more logical, noting that the proposed Grade B contour area of the Inverness facility is essentially rural and does not invade the core population areas of the principal ADI(s) in west central Florida. It concludes, therefore, that the area is more likely to fall within the dominance of an Inverness facility (Bureau's Findings, p. 30). The town of Inverness itself, however, is part of the Tampa ADI and, as noted above, the Orlando and Gainesville ADI(s) impact the Inverness station's service area, and the area is saturated with television broadcast service from the dominant cities of the region, Tampa, Gainesville, and Orlando. The Inverness facility, as Ms. Harrison points out, would be the new entrant in the market competing for advertising dollars generated within the station's Grade B service area, and for programming with established stations licensed to the dominant urban areas of west central Florida. Ms. Harrison's conclusion that such a station would be at a distinct competitive disadvantage for the foreseeable future in competing for advertising revenues within the area seems self evident.

24. As a new entrant in the market without network affiliation, the facility at Inverness would face an additional hurdle: the essentially rural nature of the station's service area. Despite the area's rural nature and the significant amount of competition from established television stations in the area, it is argued that with innovative programming and creative management the station could prove to be successful and Ms. Harrison is taken to task for not exploring such a possibility.

25. It can always be argued and not easily refuted that it is at least theoretically possible that someone or some organization could succeed in making a full service independent television station at Inverness, Florida an economically viable operation, or, conceivably, would be willing to subsidize a losing operation for a number of years in the hopes that it would eventually become profitable. Since an applicant could not completely rule out such a scenario, an applicant for a satellite operation would bear an insurmountable burden, thereby effectively precluding the award of a license for a satellite operation. The result of requiring such a burden of proof would be to thwart established Commission policy favoring the award of a license for a satellite operation in those situations where there is an economic necessity for such an operation.

26. The Harrison report is also faulted for failing to consider a possible affiliation with the Fox network. The record, however, lacks any evidence that such an affiliation was or is a possibility for the Inverness facility. It is noted that Ms. Harrison was unable to recall, on cross-examination, the level of development of that network at the time she prepared her study (Tr. 313). Neither the Kadlec nor the Harrison studies proposed network affiliation for the Inverness broadcast facility. It must be assumed, therefore, that Mr. Kadlec as well did not consider affiliation with the Fox "Network" to be a possibility, and that he agrees with Ms. Harrison that a television station on Channel 64 in Inverness would have to operate as a full service independent television station.

27. As noted above, Ms. Harrison was questioned extensively as to the methodologies employed in her Ocala study in an attempt to demonstrate that in preparing the Inverness study, she departed from the methods employed in that earlier study. In distinguishing the two studies, Ms. Harrison testified that the Ocala study proceeded on the basis of certain assumptions which she was required to make with respect to the Ocala situation which, in her opinion, do not apply to the Inverness station, and which greatly affected her ultimate conclusion. Specifically, Ms. Harrison testified that she was told to assume network affiliation for the Ocala facility and an eight county market, with that facility capturing a set percentage of the revenues generated within that market. Although her testimony with respect to this matter could have been easily challenged if incorrect since Ms. Harrison at the time she prepared the study was working for Frazier, Gross & Kadlec, the very same firm that prepared Wabash's study for Inverness, no attempt was made to raise questions as to the credibility of these statements. It must be assumed, therefore, that Ms. Harrison testified truthfully. The methodologies employed in the Ocala study, and the conclusions reached in that study, therefore, in no way reflect adversely on the credibility of Ms. Harrison's methods or ultimate conclusion in the Inverness study.

28. The argument is raised that Meredith's position that an economic necessity exists for a satellite operation at Inverness is further weakened by the fact that another applicant, West Florida, remains in this proceeding, and that this applicant proposes a full service operation at Inverness. The Review Board, in considering this matter on appeal, was certainly aware that West Florida was still, at least technically, a party to this proceeding, since it noted that West Florida had entered into a settlement agreement with Meredith which contemplates the dismissal of the former's application. If the Review Board believed that West Florida's proposal was still a viable one, it would not have remanded this proceeding for further examination of the Harrison and Kadlec studies, since no matter how credible the Meredith study might be on further examination, West Florida would still be a full service applicant "waiting in the wings" and therefore, presumably, the favored applicant. Apparently, the Review Board accepts West Florida's representation that it no longer wants to provide a full service at Inverness; and that to continue to argue that West Florida is an applicant ready, willing and able to construct a full service television facility at Inverness runs counter to its expressed desire to have its application dismissed. West Florida certainly could have chosen to remain an active applicant for the Inverness facility, and, after the dismissal of Nancy Sharp's application, it had a distinct comparative advantage over Meredith, the only other applicant, since it alone proposes a full service operation at Inverness; a facility which, if economically viable, would be of considerable value. It has decided, however, to seek the dismissal of its application in return for a cash payment by Meredith in an amount slightly in excess of one million dollars. No purpose would be served in attempting to determine the motives for making these commitments and, furthermore, such an inquiry would clearly be beyond the scope of the Review Board's remand order.

29. The evidence of record supports the conclusion that the town of Inverness, Florida as a potential city of license for a full-service broadcast facility is in an inherently inferior geographical location. As noted above, the town

itself has a very small population and the surrounding area is basically rural in nature. Although the population within the area is estimated to grow at a rate greater than the national average, the present population is small and the rate of growth is therefore of less significance in terms of potential revenues for a broadcast facility. In addition, it faces significant competition from three established ADI(s) which dominate the area. Its shares of revenues, as projected by Ms. Harrison, will be low for the foreseeable future and, after factoring in the costs involved in constructing and operating a full service station, make it very unlikely that the station would be even marginally profitable. The Presiding Judge concludes, therefore, that the public interest would best be served by approving the settlement agreement and granting Meredith's application for a satellite operation of station WOFL-TV, Channel 35, Orlando, Florida at Inverness, Florida.

30. Meredith also renews in its pleadings the argument that favorable action on the satellite necessity issue is warranted solely on the basis of the size of Inverness, Florida's population. The Presiding Judge in his earlier *MO&O* agreed with this argument (*see*, pp. 10, *MO&O*, FCC 86M-3173, released October 27, 1986). The Review Board, on appeal, apparently did not agree, since it would not have remanded this proceeding for hearing if it believed that Meredith was entitled to such a presumption. No purpose would, therefore, be served in revisiting this argument.

31. Finally, as the Commission noted in *Central California Communications Corp.*, 47 FCC 2d 1001, 1002 (1974), "[a] television satellite station is a creature of necessity, created to provide service to small communities and/or sparsely settled areas which are economically incapable of supporting their own local television station." *See* also *Meyer Broadcasting Company*, 67 FCC 2d 593, 595-596 (1978). Ms. Harrison's study has demonstrated that Inverness, Florida is such an area. When and if the Inverness area develops to a degree to which it can support a full scale independent television station, as noted by the Commission in *Central California*, *supra*, p. 1004, "A broadcaster needs no external encouragement to maximize revenues, and a satellite operation will therefore quite naturally become a full scale local television station when sufficient revenues are available to sustain such an operation." Therefore, at renewal time, if there is an entrepreneur who wanted to operate a full service station at Inverness, a competing application could be filed and would very likely receive an advantage in the comparative hearing.

ULTIMATE CONCLUSIONS

32. The Presiding Judge finds that Meredith has demonstrated an economic necessity for a 100 percent satellite operation of its station WOFL-TV, Orlando, Florida on Channel 64, in Inverness, Florida, and resolution of the satellite necessity issue in Meredith's favor is, therefore, warranted.

33. The Presiding Judge further finds that approval of the tendered settlement agreement between Meredith and West Florida would be in the public interest since it will eliminate the need for a comparative hearing, and result in the earlier institution of a new television service at Inverness, Florida.

RULINGS

34. For good cause shown, IT IS ORDERED that the Motion for Acceptance of Late-Filed Proposed Findings filed by Wabash Valley Broadcasting Corporation on March 16, 1988 IS GRANTED, and the pleading IS ACCEPTED.

35. IT IS FURTHER ORDERED that the Mass Media Bureau's Motion to Strike filed on April 5, 1988 IS GRANTED, and paragraphs 11-12 and Footnote 5 of the "Reply Findings and Conclusions of Meredith Corporation" filed on March 30, 1988 ARE STRICKEN; and that the Motion for Summary Decision filed by Meredith Corporation on July 9, 1986 IS DISMISSED AS MOOT.

36. AND there being no longer any issue outstanding against Meredith Corporation which would bar a grant of its application, IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in acordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the Joint Petition for Approval of Settlement Agreements filed by Meredith Corporation, West Florida Television Limited and Nancy Sharp on July 9, 1986 IS GRANTED, and the Settlement Agreement IS APPROVED; that the application of West Florida Television Limited (MM Docket No. 85-395, File No. BPCT-850828KQ) IS DISMISSED WITH PREJUDICE; and the application of Meredith Corporation (MM Docket No. 85-395, File No. BPCT-850827KE) for authority to construct a new commercial television station on Channel 64, Inverness, Florida as a satellite of commonly owned station WOFL(TV), Orlando, Florida IS GRANTED subject to the following condition:[2]

Condition

In the event that the AM station proposed by application (BP-850426AC) (720 kHz, Hernando, Florida), begins operation prior to the start of the tower structure erection authorized herein, the permittee shall notify the AM station so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

[1] The subject markets are identified in Table 9, Appendix A, p. 27, Meredith Exhibit No. 1.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-420

In the Matter of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. BPET-811118KF

Permittee of Noncommercial Educational Television Station KEEF-TV, Los Angeles, CA

Order to Show Cause Why the Permit of KEEF-TV should not be revoked and Notice of Apparent Liability for a forfeiture

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., BLET-870225KE

Permittee of KEEF-TV, Los Angeles, CA

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., BMPCT-870610KU

Permittee of KEEF-TV, Los Angeles, CA

For Consent to Modify Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., BLET-870610KT

Permittee of KEEF-TV, Los Angeles, CA

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.,

Permittee of KEEF-TV, Los Angeles, CA

For Special Temporary Authority

ORDER TO SHOW CAUSE
HEARING DESIGNATION ORDER
AND
NOTICE OF APPARENT LIABILITY

Adopted: August 16, 1988; Released: September 12, 1988

By the Commission:

1. The Commission has before it for consideration: (a) the construction permit of Black Television Workshop of Los Angeles, Inc. (BTW), for noncommercial educational television station KEEF-TV, Los Angeles, California; (b) the four applications captioned above; (c) various pleadings submitted by Mary Woodfork, et al., informally objecting to the grant of said applications, and by Booker T. Wade, Jr., et al., opposing such objections; (d) the results of a preliminary investigation into various allegations of wrongdoing; and (e) comments and other materials filed on behalf of Coast Community Television and Radio Telecom and Technology, Inc., whose business interests are affected by the disposition of this matter.

2. The information brought to the attention of the Commission as a result of a dispute between Mary Woodfork, et al., and Booker T. Wade, Jr., et al., over control of BTW, raises substantial and material questions as to whether the permittee, under the control of either faction, possesses the requisite qualifications to be or remain a permittee of the captioned station and whether the public interest, convenience and necessity would be served by grant of any of the captioned applications. If substantiated, the information could warrant revocation of the construction permit[1] or denial of the subject applications.[2]

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a) of the Communications Act of 1934, as amended, Black Television Workshop of Los Angeles, Inc., IS DIRECTED TO SHOW CAUSE why the permit of KEEF-TV, Los Angeles, California, should not be REVOKED, at a hearing to be held at a time and place specified in a subsequent Order, upon the following issues:

(a) To determine whether control of the permittee corporation (BTW) was transferred without Commission approval, or exercised by persons not authorized to do so, in violation of Section 310(d) of the Communications Act; and, if so, whether such unauthorized control was due to the feasance, malfeasance, misfeasance, or nonfeasance (including but not limited to those actions mentioned in items (b) and (c) below) of the original eight directors, [3] or any of them, constituting BTW's board in 1983; the group of four directors,[4] or any of them, claiming to control BTW now; or any other persons or groups presently or formerly associated with BTW.

(b) To determine whether any of the aforementioned persons made misrepresentations to the Commission, were lacking in candor in their dealings with the Commission, or attempted to mislead or deceive the Commission as to the true ownership and control of the permittee in BTW's original per-

mit application and related documents, in the subsequent above-captioned applications, in Ownership Reports filed with the Commission, and in pleadings filed with the Commission with respect to the past and current control of BTW.

(c) To determine whether any of the aforementioned persons violated Section 73.3613(b) of the Commission's rules by failing to file the organizational documents required thereunder, including articles of incorporation and bylaws and any amendments thereto, and by failing to report any agreements or understandings affecting ownership and control of the permittee.

(d) To determine, in light of the evidence adduced under the foregoing issues, whether any of the persons or groups named above possesses the requisite qualifications to be or remain a permittee of the captioned television station.

(e) If, in light of the evidence adduced pursuant to the foregoing issues, it is determined that revocation of the permit for station KEEF-TV, Los Angeles, CA, is not warranted, to determine, pursuant to Section 309(e) of the Communications Act, whether grant of the captioned applications, or any of them, will serve the public interest, convenience, and necessity.

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, is directed to serve upon Black Television Workshop of Los Angeles, Inc. (through the parties named in paragraph 11 below), within thirty (30) days of the release of this Order, a Bill of Particulars with respect to Issues (a) through (c) above.

5. IT IS FURTHER ORDERED, That pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the burden of proceeding with the evidence and the burden of proof shall be upon the Mass Media Bureau as to issues (a) through (d), inclusive.

6. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, both the burden of proceeding with the introduction of evidence and burden of proof with respect to issue (e), shall be upon Black Television Workshop of Los Angeles, Inc.

7. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the parties, pursuant to Section 1.91(c) of the Commission's rules, in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause a written appearance stating that they will appear at the hearing and present evidence on the matters specified in the Order. If a party fails to file an appearance within the time specified, the right of that party to a hearing shall be deemed to have been waived. *See* Section 1.92(a) of the Commission's rules. Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty (30) days of the receipt of the Order to Show Cause. *See* Section 1.92(a) of the Commission's rules. In the event the right to a hearing is waived by all the parties to this proceeding, the presiding officer, or the Chief Administrative Law Judge if no presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate order will be entered. *See* Section 1.92(c) of the Commission's rules.

8. IT IS FURTHER ORDERED, That if it is determined that the hearing record does not warrant an Order revoking the permit of Black Television Workshop of Los Angeles, Inc., for station KEEF-TV, it shall also be determined if the permittee has willfully or repeatedly violated Section 310(d) of the Communications Act of 1934, as amended, or Section 73.3613(b) of the Commission's rules. If so, it shall also be determined whether an Order for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, in an amount up to 20,000 for the willful or repeated violation of said rules and statutes.

9. IT IS FURTHER ORDERED, That this document constitutes a Notice of Apparent Liability for forfeiture for violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3613(b) of the Commission's rules. The Commission has determined that, in every case designated for hearing involving revocation of permits or denial of license applications, for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Since the procedure is thus a routine or standard one, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of the case should be; that judgment is, of course, to be made on the facts of each case.

10. IT IS FURTHER ORDERED, That, in light of the interest in keeping the station operational during the pendency of this proceeding, we hereby grant special temporary authority[5] for the station to operate substantially in accordance with the representations made in BTW's application for construction permit and pursuant to the technical modifications proposed in BMPCT-870610KU. KEEF-TV's silence has deprived the Los Angeles community of noncommercial educational television programming intended to meet the needs of its minority populations. Accordingly, we believe the public interest requires such temporary operations. This action does not represent any Commission predisposition toward the outcome of this case but merely allows temporary restoration of service by, or under the supervision of, the group whose control of BTW has already been passed upon and approved in a comparative proceeding, to wit: Mary Woodfork, Clint Wilson, Gary Cordell, Roy Campanella, Jr., Linda Pate, Titilola Payne Parker, Jerrome Duncan, and Rosa Ware. The station is to be operated in accordance with the rules and statutes applicable to noncommercial educational television licensee. Bylaws and other rules governing the interactions and decision-making procedures of the aforementioned members of the controlling body shall be submitted to the Mass Media Bureau within twenty (20) days of the release of this Order.

11. IT IS FURTHER ORDERED, That the following persons be made parties to this proceeding, and further, That the Secretary send a copy of this Order by *Certified Mail - Return Receipt Requested*, to:

Mary Woodfork, Clint Wilson, and
Gary Cordell
c/o Daniel J. Simms, Esq.
Arena Tower II, Suite 1040
7324 Southwest Freeway
Houston, TX 77074

Roy Campanella, Jr.
422 S. Rexford Drive
Beverly Hills, CA 90212

Linda Pate
433 N. Palm Drive
Beverly Hills, CA 90210

Titilola Payne Parker
4801 W. 96th St.
Inglewood, CA 90301-3637

Jerrome Duncan
Grant & Duncan
300 S. Grand Ave., 28th Floor
Los Angeles, CA 90071

Booker T. Wade, Jr., Rosa Ware,
Gwendolyn May, and Hope S. Smith
c/o Stephen T. Yelverton, Esq.
Maupin Taylor Ellis & Adams P.A.
3201 Glenwood Avenue
Raleigh, NC 27612

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Section 312(a)(1) of the Communications Act of 1934, as amended, states that "[t]he Commission may revoke any station license or construction permit . . . for false statements knowingly made . . . in the application." Section 312(a)(2) permits the Commission to revoke a construction permit "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." Section 312(a)(4) permits revocation for willful or repeated violation of, or failure to observe, any provision of the Act or the Commission's Rules.

[2] Section 309(e) of the Communications Act of 1934, as amended, states that a formal hearing designation is appropriate if a substantial and material question of fact exists with respect to any such applications or if the Commission for any reason is unable to make the finding that the public interest, convenience, and necessity will be served by granting such applications.

[3] Mary Woodfork, Clint Wilson, Gary Cordell, Roy Campanella, Jr., Linda Pate, Titilola Payne Parker, Jerrome Duncan, and Rosa Ware.

[4] Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope S. Smith.

[5] Such temporary operation is authorized for an initial period of 180 days and may be extended for additional periods. 47 U.S.C. § 309(f), 47 C.F.R. § 73.1635.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., NORTHWESTERN BELL TELEPHONE CO., and PACIFIC NORTHWEST BELL TELEPHONE CO.

AAD 8-1927

Payment of Commissions for Sales of Interstate Services

MEMORANDUM OPINION AND ORDER

Adopted: August 29, 1988; Released: September 12, 1988

By the Chief, Common Carrier Bureau:

1. On July 15, 1988, The Mountain States Telephone and Telegraph Co., Northwestern Bell Telephone Co. and Pacific Northwest Bell Telephone Co. (hereafter, petitioners) filed a petition seeking authority to pay commissions for the sale of interstate services. Petitioners state that we recently granted a similar request filed by the Ameritech Operating Companies,[1] and note that we stated therein that we would consider similar requests on an expedited basis.[2]

2. The *Ameritech Sales Agency Order* describes the policy considerations underlying the Commission's decision to allow the Bell Operating Companies (BOCs) to market network services through sales agents, including their affiliates, and summarizes both the Commission's initial decision not to authorize the BOCs to pay commissions to sales agents for their sale of interstate services and its decision on reconsideration allowing two BOCs to pay commissions for certain interstate services. We will not repeat that history here. In the *Ameritech Sales Agency Order*, we concluded that the jurisdictional nature of the service no longer should determine whether commissions are allowed. We stated that allowing Ameritech to pay commissions on sales of any interstate service would remove a potential disincentive for the attraction of sales agents, and thus would further the goals underlying the *Sales Agency Order* [3] and *BOC CPE Relief Order*.[4]

3. The facts supporting the authorization for Ameritech apply with equal force to the petitioners' request. Extension of the sales agency program to include interstate services will increase petitioners' ability to attract agents, and will further their obligation to provide independent equipment vendors with a meaningful opportunity to market network services.

4. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the subject petition IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech Operating Companies, Petition for Authority to Pay Commissions for Sales of Interstate Services, 3 FCC Rcd 4161 (1988) (*Ameritech Sales Agency Order*).

[2] *See id.* at 4162, n. 20.

[3] American Information Technologies Corp. *et al.*, Interim Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services, 98 FCC 2d 943 (1984) (*Sales Agency Order*), *recon.* FCC 85-582 (released November 15, 1985).

[4] Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, 2 FCC Rcd 143 (1987) (*BOCCPE Relief Order*), *recon.* 3 FCC Rcd 22 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE TELEPHONE OPERATING COMPANIES Tariff F.C.C. No. 1 — Transmittal Nos. 369 and 384

ORDER

Adopted: April 8, 1988; Released: April 11, 1988

By the Chief, Common Carrier Bureau:

1. The GTE Telephone Operating Companies (GTE) filed Transmittal No. 369 on February 12, 1988 to implement user surrogates for certain Feature Group A (FGA) lines and Feature Group B (FGB) trunks. MCI Communications Corporation (MCI) filed a petition to suspend and investigate to which GTE replied.[1] The Tariff Division subsequently granted GTE special permission to revise its transmittal to reduce the service areas in which the user surrogates would be applied. GTE filed this revision with Transmittal No. 384, on April 1, 1988. The user surrogates for the revised areas are scheduled to become effective on April 12, 1988.

2. GTE seeks to implement a single monthly usage level surrogate for originating only FGB trunks used to provide service in Illinois. The surrogate is based on a 14-day study (including two weekends) conducted in Olney, Illinois, where GTE has a new customer. GTE Transmittal No. 369, Support Data at 1. Although Transmittal No. 369 specified that this FGB surrogate would be applied in 10 states, Transmittal No. 384 modified its application to Illinois solely. GTE also seeks to revise the two-way FGA monthly usage surrogate now applied in Iowa. The basis of this surrogate is a 14-day study, also including two weekends, of traffic patterns for non-measured interstate two-way FGA lines in Iowa. GTE states that the revision to the FGA surrogate is required due to installation of new FGA lines and increased usage. *Id.*

3. In its petition against Transmittal No. 369, MCI alleges that GTE's FGB surrogate is based on a study which sampled an insufficient number of lines and asserts that studies of other states should be conducted. MCI Petition at 2. GTE replies that the sample was sufficient as 80 percent of its originating only FGB trunks in service are located in Olney, Illinois. GTE believes the surrogate is appropriate for use in all 10 states as eight of those states do not have FGB originating only service. Thus, if the service were ever ordered in one of those states the surrogate would only be used for billing purposes until a new study could be conducted.[2] GTE Reply at 2. MCI also claims that the FGA surrogate is based on an inadequate number of lines. MCI Petition at 3. GTE counters that the 23 FGA lines that were studied constitute 95 percent of the FGA lines in service, and is thus an adequate sample. GTE Reply at 3.

4. The Common Carrier Bureau has reviewed both of the tariff transmittals, the petition and GTE's reply. We conclude that no compelling argument has been presented that the tariff proposal warrants investigation at this time.[3]

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate filed by MCI Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] MCI Petition To Suspend and Investigate, filed Feb. 29, 1988 (MCI Petition); Reply of the GTE Telephone Operating Companies, filed Mar. 10, 1988 (GTE Reply).

[2] GTE's argument is no longer germane as its revised transmittal applies the surrogate in Illinois only.

[3] GTE notes that MCI's petition is procedurally deficient as the petition is neither signed by an attorney nor verified by the signing party. GTE Reply at 1, n.*. Although we will accept MCI's petition, we advise MCI that in the future it must comply with the Commission's rules that require petitions to be verified if not signed by an attorney. 47 C.F.R. §§ 1.16, 1.52.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN BELL TELEPHONE OPERATING COMPANY
Tariff F.C.C. No. 68

Transmittal No. 1642

ORDER

Adopted: May 23, 1988; Released: May 25, 1988

By the Deputy Chief, Common Carrier Bureau:

1. The Southwestern Bell Telephone Company (SWB) filed Transmittal No. 1642 on April 14, 1988 to implement a monthly rate and a proposed nonrecurring rate for a digital WATS Access Line (WAL) channel termination and to restructure its C-Conditioning service. MCI Telecommunications Corporation (MCI) filed a petition to reject to which SWB replied.[1] By Transmittal No. 1652, filed May 16, 1988, SWB withdrew the C-Conditioning provisions of Transmittal No. 1642.[2] Transmittal No. 1642 is scheduled to become effective May 29, 1988.

2. As proposed, the digital WAL channel termination nonrecurring rate is 140.00. MCI contends that SWB has improperly rounded this rate. MCI Petition at 1. The petitioner contends that as "the claimed cost is 139.73," the rate should be 139.73 and not rounded to 140.00. As SWB has other nonrecurring rates billed at their exact cost, MCI believes that only the exact rate should be allowed in this instance as well. MCI Petition at 6.

3. SWB replies that "[r]ounded charges are administratively simpler for Southwestern Bell and its customers." SWB Reply at 2. It notes that the difference between the proposed rate and the actual cost is "minuscule" and constitutes "only .00268 (.3 rounded) of the total revenues associated with the Digital WAL offering." *Id.* at 3.

4. The Common Carrier Bureau has reviewed the SWB transmittal and the associated pleadings. We find that no compelling argument has been presented that the proposed revisions are so patently unlawful as to require rejection and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject, or in the alternative, to suspend and investigate filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] MCI Petition To Reject or, in the Alternative, Suspend and Investigate, filed Apr. 29, 1988 (MCI Petition); Reply of Southwestern Bell Telephone Company, filed May 9, 1988 (SWB Reply).

[2] Transmittal No. 1652 was filed pursuant to Special Permission No. 88-231, granted by the Chief, Tariff Division, Common Carrier Bureau on May 12, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1
Phase II

In the Matter of

Annual 1988 Access Tariff Filings

ERRATUM

Released: May 26, 1988

1. On May 20, 1988, we released an Order designating issues in the above-captioned investigation. That Order should be corrected as follows:

Footnote 5 should read: "A frozen Subscriber Plant Factor was used to allocate . . . "

Footnote 8, the penultimate sentence, should read: "In order to assist the LECs in providing us with the needed information in a usable format, we are supplying, in Attachment D, a set of guidelines for the new direct cases."

Attachment D, the second sentence, should read: "New direct cases, to be filed June 20, 1988, should include . . . "

These modifications should be incorporated in the Order as released.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-579

In the Matter of

Access Billing Requirements
for Joint Service Provision

ORDER

Adopted: August 17, 1988; Released: August 24, 1988

By the Chief, Common Carrier Bureau:

1. On June 6, 1988, the Common Carrier Bureau released an Order designating issues for investigation in the above-captioned proceeding.[1] In that Order we determined, among other things, that local exchange carriers (LECs) must submit tariff revisions to extend the expiration date of their current meet point billing provisions through August 31, 1988. 3 FCC Rcd at 3570. We now extend that tariff revision due date until further notice, leaving the current meet point billing provisions in effect until such time as, by a Final Order adopted in this proceeding, the LECs are required to make other modifications to these tariff provisions.

2. Accordingly, IT IS ORDERED that the tariff revision filing date established in the *Designation Order* in CC Docket No. 87-579 IS HEREBY EXTENDED until further notice.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Access Billing Requirements for Joint Service Provision, Order Designating Issues for Investigation, CC Docket No. 87-579, 3 FCC Rcd 3568 (1988) (*Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-406

In re Applications of

RADIO ALBERT LEA, INC. (hereafter RAL)	File No. BPH-870914MO
ALBERT LEA BROADCASTING CORPORATION (hereafter ALBC)	File No. BPH-870914MP
ARCHIE GIVENS, JR. (hereafter Givens)	File No. BPH-870914MB (DISMISSED HEREIN)
ALBERT LEA COMMUNICATIONS, INC. (hereafter ALC)	File No. BPH-870914MD (DISMISSED HEREIN)

For Construction Permit for a new FM Station on Channel 241A (96.1 MHz) in Albert Lea, Minnesota

HEARING DESIGNATION ORDER

Adopted: August 8, 1988; Released: September 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *RAL*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. RAL has not completed Item 4 correctly. RAL's application gives a post office box number as the residence for its principal, Robert Ingstad. Accordingly, RAL must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Givens*. On March 11, 1988, Givens and ALBC filed a joint request for settlement agreement. The parties requested therein the voluntary dismissal of Givens' application in consideration for Six Thousand Five Hundred Dollars (6,500.00) payable by ALBC within 10 days after grant of ALBC's application becomes final.

4. *ALC*. In addition, on February 29, 1988 ALC and ALBC also filed a joint request for approval of settlement agreement. The parties requested therein the voluntary dismissal of ALC's application in consideration for payment of Twenty-Five Thousand Dollars (25,000.00) or any greater amount that ALBC agrees to pay any other competing applicant for dismissal of its application. Payment shall also be made within 10 days after grant of ALBC's application becomes final. Since all parties' requests comply with the provisions of 47 C.F.R. § 73.3525, they will be granted. Accordingly, the applications of Givens and ALC will be dismissed.

5. The applicant below petitioned for leave to amend its application on the dates shown. The accompanying, amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
ALBC	May 5, 1988, June 28, 1988

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if either.

8. IT IS FURTHER ORDERED, That RAL shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That the joint requests for approval of settlement agreements filed by Givens, ALBC and ALC ARE GRANTED and the applications of Givens and ALC ARE DISMISSED pursuant to paragraphs 3 and 4 hereinabove.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by ALBC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § Section 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in

triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-407

In re Applications of

RICHARDSON BROADCASTING GROUP (hereafter RBG)	File No. BPH-870824MG
ELIZABETH M. YOUNTS (hereafter Younts)	File No. BPH-870824MH
GREENE BROADCASTING, INC. (hereafter Greene)	File No. BPH-870824MI
SOUTHERN RADIO LIMITED PARTNERSHIP (hereafter Southern)	File No. BPH-870824MT

For Construction Permit for
a New FM Station, Channel 273A,
Southern Pines, North Carolina

HEARING DESIGNATION ORDER

Adopted: August 8, 1988; Released: September 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* On April 26, 1988, RBG filed a petition to deny Younts' application. Jack Younts, the original applicant, passed away on December 18, 1987. Subsequently, his will was admitted to probate and letters testamentary were issued to his widow, Elizabeth M. Younts. Mrs. Younts became executor of his will, possessing the authority to transfer all right, title and interest of Mr. Younts in the application to herself. On January 19, 1988, Elizabeth Younts filed an amendment to report these facts in a "Petition for Leave to Amend" and requested substitution for Jack Younts in the application. In the petition to deny, RBG claims that this amendment proposed a 100% change in ownership and thus requires the issuance of a new file number and, consequently, the return of Younts' application.[1]

3. In *Rose Broadcasting Company*, 68 FCC 2d 1248 (1978), upon the death of Sol Rosinsky, who held 51% of the company's stock, Rose promised to amend its application, which as in the case of Yount, was one of several competing applications to replace a deleted facility in Vancouver, Washington. The amendment showed that the stock was transferred to his widow, Phyliss Rosinsky, as personal representative, and by her, to Phil Jackson, who previously owned 14% of Rose. In analyzing the facts presented, the Commission stated:

> When a party controlling a licensee dies, and an application for an involuntary transfer of control is filed on Form 316, the Rules require that a Form 315 application be filed eventually to show the result of the administration of the estate. It would make no sense, however, to exempt applicants from the new file number rule during administration, only to dismiss the application when the requisite Form 315 was filed. Nor should it make any difference whether control was transferred pursuant to a distribution in kind (where the ultimate taker of the stock is the heir or legatee of the deceased), or pursuant to a sale by the estate, as here, followed by distribution of the proceeds of the sale to the heirs or legatees. An estate cannot be expected to prosecute an application except as an interim holder. Thus the sale of its interest in an applicant must be construed as involuntary. We note that on several occasions, applicants have been allowed to amend after designation to show transfers resulting from the death of a party to an applicant. *See Azalea Corp.*, 38 FCC 2d 95, 25 RR 2d 975 (Rev. Bd. 1972); *Creek County Broadcasting Co.*, 31 FCC 2d 462, 22 RR 2d 891 (Rev. Bd. 1971); *Florida Gospel Network*, FCC 77-1211, 41 RR 2d 146 (A.L.J. 1977). No stricter rule should apply where the hearing has not yet begun. Moreover, in the two cited Review Board decisions, the Board specifically found transfers to ultimate takers occasioned by the death of a party to be 'involuntary.' Even though those determinations were made in the context of analyzing good cause as required by Section 1.552(b), it would be inconsistent to have a different standard of what is voluntary under Section 1.552, than under the transfer of control rules. (*See Gaffney Broadcasting, Inc.*, 35 RR 2d 1607 (1976), or a discussion of the rules governing transfers of control.) Accordingly, we hold that the sale of Rosinsky's stock by his estate constitutes an involuntary transfer of control, and does not require assignment of a new file number to the Rose application.

Rose Broadcasting Company, 68 FCC 2d at 1248-9. RBG attempts to distinguish the cited authority on the grounds that it involves *corporate* shareholders, and RBG claims that it could find no authority permitting substitution of a 100% individual applicant. We believe that RBG attempts to draw a distinction without a difference. A "long form" assignment/transfer application is required in either case, and the rationale for considering the transaction "involuntary" is identical. Therefore, we will deny RBG's petition to deny, and accept Younts' amendment. However, Younts will not be allowed to improve its comparative position by this amendment. *See Rose Broadcasting, Id.* at 1249-50.

4. *Petitions for Leave to Amend.* Younts and Greene have petitioned for leave to amend their applications on the dates shown below. The accompanying amendments were filed after November 14, 1987, the last date for filing

amendments as of right. The first amendment to be addressed is the previously referred to Yount amendment, substituting Elizabeth M. Younts for her deceased husband, Jack S. Younts, as the applicant. Because we believe that good cause exists for the filing of this amendment, we will accept it pursuant to Section 73.3522(a)(6) of the Commission's Rules. Greene's amendment alters its originally proposed site, and Greene states in his petition that the landowner of the originally proposed site is no longer interested in selling the land. Accompanying the new proposed site change is a certification indicating that Greene has secured reasonable assurance at the newly proposed site. Pursuant to Section 73.3522(a)(6) of the Commission's Rules, we will accept this amendment for good cause. However, neither applicant may improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the below-dated amendments will be disallowed.

APPLICANT	AMENDMENT FILED
Greene	December 16, 1987
Younts	January 19, 1988

5. *EEO*. In response to Section VI of FCC Form 301, Younts indicated that she will employ five or more full-time employees. Therefore, she is required to submit the five-point Model Equal Employment (EEO) Program (FCC Form 396A). The guidelines to the Model EEO Program, paragraph IV, instruct the applicant to specify the sources that it proposes to use in recruiting minority and female applicants. However, Younts fails to provide any specific source for recruiting minority applicants. Accordingly Younts will be required to amend its application within 30 days of the release of this Order, but submitting specific sources of minority recruitment to the presiding Adminstrative Law Judge.

6. Applicant RBG proposes to mount its antenna on the existing tower of WEEB(AM). Our study indicates that the operation of the new proposal and the existing WEEB(AM) facilities may significantly exceed the radiofrequency (RF) radiation guidelines under 47 C.F.R. § 1.1307(b). Accordingly, the applicant is required to amend its application within 30 days of the date of this Order to demonstrate compliance with the RF radiation guidelines. The applicant must submit a detailed study base upon OST Bulletin No. 65, October 1985, entitled "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Radiation." This study must include the cumulative effects of the proposed operation and the WEEB(AM) operation. If a fence is to be built, the applicant must give the distance from the base of the tower to the fence. Since the proposal of the applicant may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicant is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, the applicant will be require to file, within 30 days of the release of this Order, an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

7. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and applicant Younts have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Younts would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. Data submitted by the applicants indicate there would be significant diference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to RBG, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Younts would constitute a Hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the Petition to Deny filed by RBG is HEREBY DENIED.

11. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed by Greene and Younts ARE HEREBY GRANTED and the corresponding amendments ARE HEREBY ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Younts shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, RBG shall submit the environmental assessment required by Section 1.311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] As RBG points out, Section 73.3573(b) of the Commission's Rules provides that a new file number will be assigned to an application for a new station when it is amended prior to designation for hearing so as to result in a transfer of control, for which, in the case of an existing licensee, or permittee, would have to be filed on Form 315, *i.e.*, when the original party to the application does not retain at least a 50% ownership interest. Section 73.3540 and 73.3541 of the Rules require an application for transfer of a controlling interest in a license to be filed on Form 315, except for pro forma and involuntary transfers of control, which may be filed on Form 316.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-409

In re Applications of

DAVID FIVEASH (hereafter Fiveash)	File No. BPH-851213MH
TOMMY TURNER CARRUTH (hereafter Carruth)	File No. BPH-851213NK
D & E TREVINO, PARTNERSHIP (hereafter "Trevino)	File No. BPH-851216NB
BETTER NEWS, INC. (hereafter Better News)	File No. BPH-851216ND
MATTHEW C. TRUB (hereafter Trub)	File No. BPH-851216NE

For a Construction Permit for
a New FM Station on
Channel 226A, Port Isabel, Texas.

HEARING DESIGNATION ORDER

Adopted: August 8, 1988; Released: September 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters*. Fiveash has proposed to side-mount its antenna on a tower to be constructed by an applicant for a new FM station in South Padre Island, Texas. It is evident from Fiveash's application that he intended to side-mount on the tower proposed by Nina Jean Rubinsky. *See* Exhibit E-5 of Fiveash's application. Rubinsky's application for new FM service to South Padre Island was returned by the staff on November 18, 1985, as unacceptable for filing. *See Spanish Aural Services Company*, 3 FCC Rcd 2739 (1988) (Hearing Designation Order). Rubinsky petitioned for reconsideration of the return of her application but this petition was denied in the order designating the other applicants for new FM service to South Padre Island, Texas for hearing. *Id*. Fiveash's application did not provide an alternate tower site to be used in the event that Rubinsky's application for South Padre Island was not granted and her tower not constructed. Neither does Fiveash indicate whether he would be prepared to construct the tower at the site specified should Rubinsky fail to construct. Moreover, Fiveash has not amended his application to disclose his present inability to side-mount on a constructed tower. Fiveash's application therefore presents the question of whether Fiveash has attempted to conceal material facts from the Commission. Consequently, appropriate site availability and reporting issues will be specified.

3. Engineering study also reveals that the tower data submitted in Section V-G of FCC Form 301 (April 1985) in Fiveash's application is inconsistent with that contained in Commission records. In Item 5, Section V-G, Fiveash lists the overall height above ground level (AGL) of the tower as 578.9 feet and the overall height above mean sea level (AMSL) of the tower as 528.7 feet. However, the Commission's Antenna Survey Branch records indicate that clearance was requested from the Federal Aviation Administration (presumably for Rubinsky's proposed tower) for heights of 500 feet AGL and 510 feet AMSL for the requested site. (Study No. 85-ASW-2366- OE). The discrepancy between the tower data listed in Fiveash's proposal and Commission records does not render Fiveash's application unacceptable for filing. However, assuming that he intends to construct the tower proposed at the requested site, Fiveash must either amend the overall tower height figures listed in Item 5, Section V-G of his application to agree with those on file with the FAA or file with the FAA to amend the data in FAA records. Such an amendment must be filed within 30 days of the release of this Order. Additionally, an air hazard issue will be specified against Fiveash pending resolution of this discrepancy.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. (a) To determine whether Fiveash has reasonable assurance that the transmitter site specified will be available to him.

(b) To determine, in light of the facts adduced pursuant to issue (a) above, the facts and circumstances surrounding Fiveash's failure to timely update his application and whether Fiveash violated 47 C.F.R. § 1.65.

(c) To determine, in light of the facts adduced pursuant to issues (a) and (b) above, whether Fiveash attempted to conceal material facts from the Commission and, if so, the effect thereof on his basic qualifications to be a Commission licensee.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Fiveash.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That Fiveash shall submit an amendment in accordance with paragraph 3 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c) in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The applications of Luisa Rappazzo, BPH-851216NC, and Astrid Garza Uribe d/b/a Border Broadcasting, BPH-851216NF, were returned by staff letters on January 6, 1988 as unacceptable for filing. Neither applicant has filed a petition for reconsideration of the staff's action. The application of Hughes P.I. Broadcasting, BPH-851216QK, was returned by staff letter on March 10, 1986, as unacceptable for tender. Hughes refiled this application on February 10, 1986, but this application was also returned, by staff letter on May 13, 1986. Hughes has not filed a petition for reconsideration of this action.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-410

In re Applications of

CAMELBACK RADIO BROADCASTERS, L. P. (hereafter Camelback)	File No. BPH-870909MC
SCOTTSDALE TALKING MACHINE AND WIRELESS CO., INC. (hereafter Scottsdale)	File No. BPH-870909MF
PARADISE VALLEY BROADCASTERS LTD. PARTNERSHIP I (hereafter Broadcasters)	File No. BPH-870910MB
GIL L. LYONS (hereafter Lyons)	File No. BPH-870910MC
HOPE VALLEY FM LIMITED PARTNERSHIP (hereafter Hope Valley)	File No. BPH-870910ME
PATRICIA HAMPTON (hereafter Hampton)	File No. BPH-870910NE
Julia S. Zozaya d/b/a AMERICAN INTERNATIONAL DIVERSIFIED (hereafter Diversified)	File No. BPH-870910NH
Philip C. Davis and Lisa M. Davis d/b/a PARADISE VALLEY BROADCASTERS (hereafter Paradise Valley)	File No. BPH-870910NK
PARADISE VALLEY ASSOCIATES LIMITED PARTNERSHIP (hereafter Associates)	File No. BPH-870910OB

For Construction Permit for
New FM Station, Channel 290A, 105.9 MHz
Paradise Valley, Arizona

HEARING DESIGNATION ORDER

Adopted: August 8, 1988; Released: September 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Scottsdale*. Katharine Sue Klein, a principal of the applicant, has indicated that she is employed as an account executive at KKLT(FM), Phoenix, Arizona and will terminate this employment if a construction permit is awarded to Scottsdale as a result of this proceeding. Accordingly, Ms. Klein's divestiture commitment will be reflected in an appropriate ordering clause.

3. Scottsdale has requested a waiver of 47 C.F.R. § 73.315 because its principal city contour does not encompass the entire city of Paradise Valley. However, the staff has determined that the applicant is in substantial compliance with this rule. *See John R. Hughes*, 50 Fed. Reg. 5679 (1985). Accordingly, Scottsdale's request for waiver will be dismissed as moot.

4. *Broadcasters*. Item 9(b) of Section II of FCC Form 301 requires applicants to indicate if "any funds, credits or other financial assistance for the construction, purchase or operation of the station" will be provided by aliens and if the answer is "yes" to provide an exhibit "giving full disclosure concerning this assistance." Broadcasters has indicated that its two limited partners are aliens and that each will hold a 5% equity in the proposed station. Exhibit 1 of Broadcasters' application states that "[c]ontributions to the financing of this applicant will be made by the limited partners who are aliens." This statement is not a sufficient response to the requirement of Item 9(b) to provide a "full disclosure" of the financial arrangement Broadcasters has with its two alien limited partners. Accordingly, Broadcasters will be required to file with the presiding Administrative Law Judge within 30 days of the release of this Order, an amendment expanding on its response to Item 9(b), Section II, FCC Form 301.

5. *Diversified*. The applicant proposes to build a new tower and mount its antenna with a radiation center above ground level of 7.6 meters. While Diversified states in its application that use of Appendix B, Table 1 of the OST Bulletin No. 65 demonstrates the proposal's compliance with FCC specified guidelines for human exposure to RF radiation, Diversified goes on to state that this compliance is based on use of a "best case" antenna with respect to downward radiation. However, Diversified makes no supportive showing to demonstrate that the proposed antenna is a "best case" antenna, i.e. submission of manufacturer's vertical radiation pattern for the proposed antenna. Our study based on "worst case" methods from the OST Bulletin indicates that the proposed operation may significantly exceed the radio frequency radiation guideliness under 47 C.F.R. § 1.1307(b). Accordingly, Diversified is required to amend its application within thirty days of the date of this Order to demonstrate compliance with the RF radiation guidelines. Since the proposal of Diversified may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicant is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, the applicant will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative

Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

6. Diversified has requested a waiver of 47 C.F.R. § 73.315 because its principal city contour does not encompass the entire city of Paradise Valley. The staff has determined that the applicant is in substantial compliance with this rule. *See Hughes, supra.* Accordingly, Diversified's request for waiver will be dismissed as moot.

7. *Paradise Valley.* In Exhibit 4, Philip C. Davis, a principal of the applicant, indicates his intention to divest all ownership interests, as reflected in Exhibit 1, if a construction permit is awarded to the applicant as a result of this proceeding. Exhibit 1 reveals that Philip C. Davis is a Trustee of and has an 8.3% beneficial interest in the M. Philip Davis Trust, which is the general partner of KLOK Radio Ltd., the licensee of KLOK(AM), San Jose, California and KFIG-AM and FM, Fresno, California. Paradise Valley has failed to sufficiently demonstrate that Philip C. Davis as a trustee of, and having a beneficial interest in, the M. Philip Davis Trust can divest himself of the above-specified broadcast interests. Accordingly, Paradise Valley will be required to file an amendment clarifying the ability of Philip C. Davis to divest his broadcast ownership interests within 30 days of the release of this Order with the presiding Administrative Law Judge who will specify an appropriate divestiture Order, if necessary.

8. *Other Matters.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and from Hope Valley and Associates have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by these applicants would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Scottsdale	April 18, 1988
Paradise Valley	December 1, 1987; February 2, 1988, March 25, 1988

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Diversified, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Hope Valley, Associates.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That if a construction permit is awarded to Scottsdale, that Katharine Sue Klein terminate her employment with KKLT(FM) prior to the commencement of program test authority.

14. IT IS FURTHER ORDERED, That Broadcasters file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order which provides the information discussed in paragraph 4, above.

15. IT IS FURTHER ORDERED, That in accordance with paragraph 5 hereinabove, Diversified shall submit an amended environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That Paradise Valley file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order clarifying the ability of Philip C. Davis to divest his broadcast interests.

17. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.315 by Scottsdale and Diversified ARE DISMISSED AS MOOT.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Scottsdale (4/18/88); Paradise Valley (12/1/87, 2/2/88, 3/25/88).

20. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the

Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-37

In the Matter of:

Amendment of Section 1206:	RM-2564
Broadcast of Telephone	RM-2571
Conversations	RM-4680

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 11, 1988; Released: September 13, 1988

By the Commission:

INTRODUCTION

1. Before the Commission for consideration are the initial and reply comments[1] filed in response to the *Notice of Proposed Rule Making* [2] (*Notice*) in the above-captioned proceeding. After carefully reviewing these pleadings and the proposals advanced in the *Notice*, we have decided not to revise the existing provisions of Section 73.1206 of our rules governing the broadcast use of telephone coversations.[3]

BACKGROUND

2. Section 73.1206 of the Commission's rules now requires broadcast licensees to notify parties to a telephone conversation of the licensee's intention to broadcast the conversation prior to either broadcasting the conversation live or recording the conversation for subsequent broadcast. An exception to this obligation is provided where the party to the conversation is aware or may be presumed to be aware that the exchange is likely to be aired by the licensee.[4]

3. In 1947, the Commission adopted a *Report* regulating the recording of telephone conversations generally.[5] In that decision, the Commission acknowledged that recording devices, which were often prohibited by telephone company tariffs, have a "useful and legitimate place in the conduct of governmental and private business."[6] The Commission also recognized, however, the "importance and desirability of privacy in telephone conversations,"[7] and ruled that the use of a recording device in connection with two-way, interstate or foreign message toll telephone service would be permitted only if adequate notice were given to all parties that the telephone conversation was to be recorded. Adequate notice was deemed to be provided by the operation of a device that automatically produced a distinct, audible tone-warning (beep tone) signal at regular intervals during the conversation when the recording device was in use.[8] This beep tone requirement applied, with certain limited exceptions,[9] to all telephone recordings subject to the Commission's jurisdiction.[10]

4. Separate rules governing the broadcast, as distinct from the recording, of telephone conversations were not adopted at that time. Because the live interconnection of the telephone system and broadcast stations had not yet evolved, the broadcast use of telephone conversations required that the call first be recorded. This ensured that the parties to any call that might be broadcast would be afforded notice of the potential loss of privacy through the application of the beeptone requirement at the time of the recording. These circumstances changed, however, with the adoption of the Commission's decision in the *Carterfone* matter.[11] This decision authorized the use of equipment that provided a direct interconnection between radio transmission facilities and telephone systems, thereby permitting for the first time the live broadcast transmission of telephone calls. Because the beep tone notice requirement applied only to the recording of telephone conversations, substantial uncertainty arose in the wake of the *Carterfone* decision concerning the notice obligations applicable to the simultaneous or live broadcast of telephone calls. To resolve this uncertainty, the Commission commenced a rule making proceeding that ultimately resulted in the adoption in 1970 of the current provisions of Section 73.1206 of the rules.[12] Two years later, in response to complaints by broadcasters that the beep tone was disruptive and, in light of the adoption of Section 73.1206, unnecessary, the Commission waived the beep tone notice requirement for broadcast licensees. The Commission reasoned:

> [A]ssuming that a broadcast licensee complies with the aforementioned rules [Section 73.1206], the parties to the telephone conversation are aware that it is the intent of the licensee to broadcast the telephone conversation over the air where it will be overheard and/or freely recorded by the listening public. Therefore, it appears that there is no need to transmit a "beep tone" in these circumstances as the parties have already agreed to the loss of privacy that would otherwise be protected by the "beep tone."[13]

5. More recently, the Commission received three petitions for rule making seeking to amend Section 73.1206. These petitions were submitted by (1) Edith Martindale, Don Martindale and Herbert Terry (Martindale): RM-2564; (2) Doubleday Broadcasting Company, Inc. (Doubleday): RM-2571; and (3) the National Association of Broadcasters (NAB): RM-4680. The petitioners raised various issues concerning the point in time at which a broadcaster should be required to notify other parties that a telephone conversation is being recorded for broadcast or is being broadcast simultaneously with its occurrence. Martindale favored the existing prior notice requirements and requested the incorporation of additional safeguards in Section 73.1206.[14] Doubleday and NAB, on the other hand, argued that the current requirements for prior notification limit spontaneity and the free flow of information and opinion. In response to these petitions, the Commission issued the *Notice* in this proceeding.

6. *The Notice*. The *Notice* determined that certain policy and rule changes in Section 73.1206 might be justified, but expressed a concern that such changes must properly balance the dual objectives of "meeting the legitimate needs of the listening public to obtain information from broadcast news and information programs and ensuring the

public's right to privacy with respect to the recording of conversations that may be used on the air."[15] Reflecting the competing nature of the interests at issue, the *Notice* asserted that there are "significant privacy and other First Amendment concerns involved in the broadcasting of recorded material" and that "there may be a general expectation of privacy with regard to telephone conversations," yet it also expressed a concern "about inhibiting the free flow of information."[16]

7. The *Notice* offered two basic alternatives to the existing rule's provisions. First, we proposed to amend Section 73.1206 to permit a licensee to record a telephone conversation without first informing the parties to the conversation that the station intends to broadcast the call subsequently, provided the licensee, at some time prior to the actual broadcast, obtains consent for the broadcast. Because this alternative would permit a broadcast licensee to record a telephone conversation without affording the parties to the call any prior notice of the recording, the Commission inquired whether the beep tone/all party consent requirements ordinarily applicable to telephone recording should be reimposed for any broadcaster who utilized the post-recording consent option.[17] We noted, in this regard, that the beep tone notice requirement had been originally waived for broadcasters only because Section 73.1206 dictated *pre-recording* notice to parties whose telephone conversations were recorded for later broadcast. In connection with this alternative, the *Notice* also requested comment on a proposal made by NBC in comments supporting Doubleday's initial rule making petition that broadcasters should be permitted to retain tapes of telephone conversations recorded for broadcast even where consent to the actual broadcast is denied.[18]

8. Second, the *Notice* invited comments on the possibility of eliminating Section 73.1206. We observed that substantial privacy protections are provided by other federal laws and by state statutes and inquired whether these provisions might "adequately protect telephone conversations from being recorded and used for broadcast purposes without prior consent."[19] On the federal level, we noted the provisions of Section 2511 of the Omnibus Crime Control and Safe Streets Act of 1968 (Omnibus Crime Act),[20] which protect parties' privacy rights in telephone conversations by requiring prior *one-party* consent before recording is permitted. On the state level, we observed that many jurisdictions directly regulate recordings of both wire and oral communications, in some cases more restrictively than applicable federal provisions, and that some states have codified the right to privacy and provided statutory remedies for the violation of this right.[21] Finally, we pointed out that potential invasions of an individual's privacy may also be inhibited by the availability to the individual of a civil remedy in tort should his or her conversations be broadcast without proper consent.

COMMENTS

9. Eighteen comments and one reply comment were received in response to the *Notice*. Of the eighteen initial comments, eleven favored either relaxation or elimination of the rule, while seven supported either retaining the rule as drafted or strengthening its provisions.

10. The consensus of broadcast parties responding to the *Notice* is that the current rule imposes unnecessary restrictions on broadcasts of telephone conversations and should be relaxed or eliminated. Broadcasters argue that the existing prior notification requirements inhibit spontaneity and immediacy in telephone conversations, undermining the effectiveness of the news and entertainment programming utilizing these conversations. CBS submits that the prior notice obligation also poses problems for reporters who may not know in advance that a particular conversation will ultimately be broadcast. Under the current rule, this uncertainty may actually prevent use of the recorded call since advance notice to the caller of the taping may not have been given and cannot be obtained legitimately after the fact. NBC adds, in this regard, that the current notification requirements prejudice broadcasters as compared to print journalists, who are free to record a telephone conversation without ever disclosing that they might later publish a verbatim transcript of the conversation.

11. Several broadcast parties supporting modification of Section 73.1206, including WRGB, Inc. (WRGB) and ABC, suggest that the current rule's requirement that broadcasters provide pre-recording notice is overbroad and unnecessary. ABC asserts, for example, that

> there is no invasion of personal privacy which warrants protection by this agency in a situation where a 'non-live' conversation is legally recorded . . . and then subsequently broadcast -- if, at some point prior to broadcast, the consent of the callee is obtained. The Commission's concern should be restricted to whether or not a telephone conversation is actually *broadcast* without the callee's permission.[22]

These parties generally believe that a pre-broadcast consent rule would fully protect the relevant privacy interests of individuals, yet would better enable broadcasters to preserve the spontaneity and unrehearsed nature of taped conversations used on the air.

12. NBC contends that the overbreadth of the existing provision also renders the rule an impermissible intrusion on the First Amendment rights of broadcasters to air speech that is "neither proscribed by statute *(e.g.,* obscenity) nor likely to incite the public to violent activity," and that, as a result, "it is incumbent upon the Commission to liberalize Section 73.1206 immediately."[23] Commenters favoring relaxation of Section 73.1206 suggest that a pre-broadcast consent rule would provide an appropriate liberalization and properly balance the competing privacy and First Amendment considerations involved.

13. The National Association of Broadcasters (NAB) agrees that adoption of a pre-broadcast consent rule is appropriate where telephone conversations are taped for later broadcast. NAB also urges the Commission, however, to permit live or recorded broadcasts of telephone conversations without the express consent of the parties to the call if the broadcaster informs the participants of the simultaneous or intended future broadcast of the conversation at the beginning of the call and prior to any substantive exchange.[24] NAB suggests that these additional changes to the notification rule will afford broadcasters increased flexibility and remove unnecessary impediments to broadcast use of telephone conversations, yet will continue to protect legitimate privacy concerns. In this latter regard, NAB asserts that its proposal is directly analogous to the level and means of privacy protection afforded by the beep tone requirement. ABC strongly concurs in

NAB's proposal as it relates to the broadcast of live telephone conversations, observing that the proposals in the *Notice* appear to have ignored this matter.

14. Several broadcast parties contend that the infirmities of the existing rule cannot be redressed by merely relaxing its requirements.[25] CBS asserts, for example, that the modification proposed in the *Notice*, under which subsequent consent could be used to authorize broadcast of a recorded conversation, may not resolve the difficulties faced by reporters in using taped conversations. CBS notes, in this regard, that the requisite consent may not be forthcoming -- either because the original source cannot be reached again or because the recording demonstrates that the source has altered his version of the facts -- and that broadcast use of the conversation will therefore be precluded. CBS also observes that any consent rule, whether pre-recording or pre-broadcast in nature, will raise difficult evidentiary problems. These parties generally argue that the Commission should simply eliminate Section 73.1206 in its entirety and leave the protection of privacy interests in connection with broadcast uses of telephone conversations to other federal and state laws. The Radio-Television News Directors Association (RTNDA) and NBC, for example, contend that the Omnibus Crime Act, state statutory provisions, and prevailing tort law adequately protect the legitimate privacy expectations of the public and that they are more appropriate means of doing so than administrative agency regulations. RTNDA observes, in this connection, that the application of these other privacy protections in specific cases is subject to full judicial review to ensure that privacy interests have not been violated. Doubleday adds that continued Commission involvement in vindicating rights to privacy in the face of these effective, protective alternatives constitutes an "inefficient use of administrative resources."

15. Parties supporting elimination of Section 73.1206 also submit that the Commission's authority to regulate privacy matters is questionable. NBC, for example, suggests that the establishment and protection of rights to privacy lies beyond the jurisdictional grant to the Commission in the Communications Act of 1934. NBC also asserts that the Omnibus Crime Act reflects a specific Congressional determination as to the proper scope of privacy in connection with recording telephone conversations and that Commission regulatory actions inconsistent with the one-party consent standard adopted in the Omnibus Crime Act are prohibited.

16. Various non-broadcast parties, including the American Legal Foundation (ALF) and several private individuals, oppose elimination or modification of Section 73.1206. These commenters argue that the existing provisions of the rule reflect the minimum restrictions on broadcast use of telephone conversations that are consistent with adequate protection of individuals' rights to privacy. ALF, for instance, claims that elimination of the current "consent" requirement "would allow broadcasters to trample at will on the legitimate privacy expectations of unsuspecting parties."[26] ALF contends that the existing provisions of Section 73.1206 properly distinguish between parties with legitimate expectations of privacy and those who have consciously surrendered these expectations. In this connection, ALF points out that the rule exempts from the notice requirement parties who are aware or should be aware of the licensee's intention to broadcast the conversation and argues that this is as much of an exception to the rule as should be provided if privacy rights are to be preserved. ALF also asserts that the rule is not burdensome and that it protects the privacy interests of individuals in a manner that is the least intrusive to broadcasters.

17. ALF strongly argues that the Omnibus Crime Act does not adequately protect the privacy of telephone conversations against recording or broadcast by broadcast licensees without prior consent. ALF notes that Section 2511 of the Omnibus Crime Act -- the only relevant provision -- provides that it is not unlawful to intercept a wire communication if the intercepting party is also a party to the conversation (*i.e.*, one-party consent), unless the interception is for the purpose of committing a criminal or tortious act. In ALF's view, the requirement that the recorded party demonstrate a criminal or tortious purpose before a recording without notice would be deemed unlawful, renders the Omnibus Crime Act unavailing as a workable protection for telephone privacy in a broadcast context.[27]

DISCUSSION

18. After careful evaluation of the arguments presented by the commenting parties and consideration of the Commission's recent determinations in its *Report and Order* in Docket No. 20840,[28] we have decided not to alter the prior notice provisions of Section 73.1206. While we appreciate broadcasters' interest in enhancing the spontaneity and unrehearsed nature of telephone conversations that they utilize on the air, we are convinced that our rules can and should play a role in protecting the legitimate expectations of privacy in connection with the broadcast use of telephone conversations. Our decision in this matter is prompted by several considerations.

19. Fundamentally, we are not persuaded that the potential benefits to broadcasters from deleting or substantially relaxing Section 73.1206 would be sufficient to offset our concern for protecting the privacy of individuals. As suggested in the *Notice*, we believe that there is a legitimate expectation of privacy that telephone calls will not be broadcast without the consent of the parties involved. Under these circumstances, we believe that it is reasonable and desirable to retain for individuals the right to answer the telephone without having their voice or statements transmitted to the public by a broadcast station in the absence of prior notice. For similar reasons, and in order to ensure effective compliance with respect to the broadcast of telephone conversations, we also believe that individuals should continue to have the right to prior notice in cases where a telephone conversation is being recorded for later broadcast.

20. We are aware, of course, that our beep tone tariff requirements permit concurrent notice and recording if the notice is given at the beginning of the taped conversation. We are not persuaded to extend a similar provision to recordings of telephone conversations for broadcast use or to live broadcast situations. Broadcast use of an individual's telephone conversations carries the potential for a more serious and intense loss of privacy than the singular recording of a conversation by the other party to the call. We are convinced that this risk, and the need for an effective enforcement mechanism, warrant continuation of our longstanding requirement that notice of intent to broadcast a conversation actually precede the recording or transmission of the telephone call.

21. Our conclusion is also driven by our belief that the burdens imposed by a prior notice requirement are not excessive and that the benefits to broadcasters from either substantial relaxation or elimination of the rule are modest. A primary benefit to be obtained by relaxing the rule as proposed, or eliminating it altogether, would appear to be to enhance the entertainment value and audience appeal of a station's programming through increased spontaneity in telephone conversations. While undoubtedly desirable, we cannot conclude that such enhancement of programming appeal is sufficiently critical as to justify intruding on individual privacy. Moreover, while potentially increasing the spontaneity of some "broadcast" telephone conversations, the absence of a notice requirement or the adoption of a relaxed notice provision could also lead to a general reduction in individuals' privacy expectations that, in turn, could well decrease the information flow to broadcast station reporters in many other conversations. We are sensitive to the First Amendment concerns raised by broadcasters in this connection. We continue to believe, however, that the prior notice requirements of Section 73.1206 pursue a legitimate, substantial governmental interest in protecting privacy with respect to the broadcast use of telephone conversations and are sufficiently narrowly drawn to achieve this purpose to pass constitutional muster. We note, in this regard, that broadcasters are not precluded by the notice requirement from recording or broadcasting telephone conversations nor are they prevented from telephonically gathering information or testimony important to their broadcast functions.

22. With respect to the burden imposed on broadcasters by the existing notice provisions, it seems clear that these are not excessive. In this respect, we note that under the current rule a station may begin to broadcast or to record a call at any point after informing the other party of the intended use of the conversation. While, as several broadcast parties suggest, this process may involve two phone calls by the broadcaster -- one to provide prior notice and a second to actually record the conversation -- there is no such requirement. As we stated in the *Notice*, "under the current rule licensees could make only one telephone call to obtain consent to broadcast a recorded or live telephone call and to record the telephone conversation."[29]

23. Finally, we believe that the public interest standard under which we regulate broadcast use of the electromagnetic spectrum is sufficiently broad and flexible to provide us with the justification to retain our rules regulating the broadcast use of telephone conversations in a manner that effectively protects the privacy of individuals participating in such conversations. We also do not believe that the Omnibus Crime Act, or any congressional intent underlying that statute, in any way limits our authority to impose restrictions on the broadcast use of telephone conversations in a fashion that in our view best serves the public interest. We find nothing in the Omnibus Crime Act or its legislative history suggesting that Congress intended to address the broadcast use of telephone conversations or privacy concerns related to such broadcast use.

CONCLUSION

24. While we recognize that the prior notice obligations of Section 73.1206 of our rules impose certain restrictions on broadcasters in using telephone conversations, we believe these limitations are both reasonable and necessary to protect the legitimate interests of the public in privacy in communications. Accordingly, we have elected to retain Section 73.1206 of the rules, as presently interpreted and applied, without modification.[30]

PROCEDURAL MATTERS

25. In accordance with Section 605(b) of the Regulatory Flexibility Act, the Commission certifies that the action taken herein will not have a significant economic impact on a substantial number of small entities. By retaining the telephone broadcast rules in their current form, the Commission is not changing the regulatory burden on licensees. Moreover, the Commission certified in the *Notice* in this proceeding that the alternatives to the existing rule proposed therein, even if adopted, would have had "no measurable impact on the regulatory burden on licensees."[31] Thus, our decision not to adopt these alternatives does not impose significant opportunity costs on broadcast licensees in terms of regulatory flexibility analysis.

26. The action taken herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labelling, disclosure, or record retention requirements and will not increase or decrease burden hours imposed on the public.

27. Authority for action taken herein is provided in Sections 2, 4(i), and 303 of the Communications Act of 1934, as amended.

28. Accordingly, IT IS ORDERED That, the "Request for Declaratory Ruling" filed by Tuscon Wireless, Inc., and Southwestern Wireless, Inc., on October 23, 1987, IS DENIED.

29. IT IS FURTHER ORDERED That, this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

Parties Filing Comments

1. American Broadcasting Companies, Inc.
2. American Legal Foundation
3. CBS, Inc.
4. Doubleday Broadcasting Company, Inc.
5. Donald W. Flick
6. George and Beverly Glover
7. Idaho Public Utilities Commission
8. Ann B. Kluckhohn
9. National Association of Broadcasters
10. National Broadcasting Company, Inc.
11. National Radio Broadcasters Association
12. Radio-Televison News Directors Association
13. Don Ranas
14. Ferrell D. Sears

15. Bernard Senger
16. Snider Corporation
17. Alex F. Talbott
18. WRGB, Inc.

Parties Filing Reply Comments

1. Radio-Televison News Directors Association

FOOTNOTES

[1] A list of participating parties is attached hereto as an Appendix.

[2] 50 Fed. Reg. 7931 (February 26, 1985).

[3] *See* 47 CFR Section 73.1206.

[4] Section 73.1206 provides:

> Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

[3] *Report of the Commission* in Docket No. 6787 (*Use of Recording Devices in Connection with Telephone Service)*, 11 FCC 1033 (1947).

[6] *Id.* at 1050.

[7] *Id.*

[8] The Commission recognized that the effectiveness of a superimposed, periodic tone as notice of the recording of a call depended on the awareness of the public of the meaning of the tone. Accordingly, in adopting the beep tone, the Commmission also adopted substantial publicity requirements intended to make telephone users aware of the purpose and implications of the signal. *See Report of the Commission* in Docket No. 6787, *supra* n.6 at 1052-53; *Order* in Docket No. 6787, 12 FCC 1005 (1947).

[9] Over time, five exceptions to the beep tone policy have developed. The Commission recently reformulated and consolidated these exceptions into three general categories that allow for the recording of emergency, patently unlawful and law enforcement-related telephone calls without a beep tone or consent. *See Memorandum Opinion and Order* in Docket No. 20840, 86 FCC 2d 313 (1981), *clarified on reconsideration*, 95 FCC 2d 848 (1983).

[10] To the exent intrastate and local exchange telephone recordings are regulated, they are governed by tariffs filed with the various state commissions.

[11] *Use of the Carterfone Device in Message Toll Telephone Service*, Docket No. 16942, 13 FCC 2d 420 (1968).

[12] *See Report and Order* in Docket No. 18601, 23 FCC 2d 1 (1970).

[13] *Memorandum Opinion and Order* (*Use of Recording Devices in Connection with Telephone Service)*, 38 FCC 2d 579, 580 (1972).

[14] Martindale also sought to broaden the scope of Section 73.1206 to apply its prior notice requirements to *any* recording intended for broadcast, including face-to-face interviews. In the *Notice*, the Commission determined that action on this proposal was not warranted. *Notice* at para. 14.

[15] *Notice* at para. 11.

[16] *Id.* at para. 13.

[17] Currently, there are three means by which a party may legitimize the recording of a telephone conversation. These mechanisms are detailed in Section 64.501 of the Commission's rules, which prohibits the "the use [of] any recording device," except as follows:

> (a) Where such use shall be preceded by verbal or written consent of all parties to the telephone conversation, or,
>
> (b) Where such use shall be preceded by verbal notification which is recorded at the beginning, and as part of the call, by the recording party,or,
>
> (c) Where such use shall be accompanied by an automatic tone warning device . . . .

These provisions of the rules apply by their terms only to the conduct of telephone companies in recording conversations between members of the public and their agents, but identical conditions are made applicable to the conduct of individual users of telephone service through prescriptions governing telephone companies' tariffs.

[18] NBC noted that even though the actual recording could not be aired, it can serve as proof of the accuracy of any report based upon the recorded conversation.

[19] *Notice* at para. 15.

[20] 18 U.S.C. Section 2510, *et seq.*

[21] *See, e.g.*, Va. Code Section 19.2-69 (1950), cited in the *Notice*.

[22] ABC Comments at p. 3.

[23] NBC Comments at p. 9.

[24] This suggestion is essentially identical to the proposals made by NAB and Doubleday in their petitions for Rule Making in this proceeding. *See Notice* at para. 9.

[25] Not all broadcast parties endorsed elimination of Section 73.1206 as appropriate. NAB, for example, while favoring substantial relaxation of the rule, expressly opposed simply deleting the rule altogether.

[26] ALF Comments at p. 2.

[27] ALF also objects strenuously to any suggestion that broadcasters be permitted to keep tapes of conversations for which consent to broadcast -- assuming the adoption of a pre-broadcast consent rule -- has been denied. ALF believes that permitting the retention of such tapes will only guarantee their later, unauthorized divulgence in some forum, perhaps, for example, in a judicial setting in connection with civil defamation proceedings.

[28] 2 FCC Rcd 502 (1986).

[29] *Notice at* para. 18.

[30] On October 23, 1987, Tuscon Wireless, Inc., and Southwestern Wireless, Inc., licensees of stations KKPW and KFXX-FM, respectively, (Licensees) filed a "Request for Declaratory Ruling" raising issues directly related to the matters under consideration in this proceeding. Specifically, the Licensees request the Commission to rule that Section 73.1206 of the rules, as now drawn, permits a broadcaster to air live or to record for later broadcast a telephone call from its inception if, immediately after the called party answers, the broadcaster identifies itself, advises the party

that the call is being broadcast or recorded for broadcast, and requests permission to continue broadcasting or recording. Petitioners also ask the Commission to declare that Section 73.1206 permits a broadcaster to presume consent if a party answers a station-initiated call using a phrase promoted by the station in connection with a contest or promotion.

Licensees acknowledge that both of these requests are at odds with prevailing Commission interpretations of Section 73.1206. Moreover, the requests raise concerns similar to those discussed in this *Report and Order*. Under these circumstances, we do not believe that Licensees' "Request for Declaratory Ruling" warrants further consideration and it is hereby denied.

[31] *Notice* at para. 18.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Declaratory Ruling
Concerning Programming Information
in Broadcast Applications for
Construction Permits, Transfers and
Assignments

MEMORANDUM OPINION AND ORDER

Adopted: July 13, 1988; Released: September 13, 1988

By the Commission:

1. The Commission has before it for consideration a joint "Emergency Petition for Declaratory Relief" filed by the Office of Communication of the United Church of Christ, Action for Children's Television and the NOW Legal Defense and Education Fund, requesting the Commission to issue a declaratory ruling clarifying the type of information which applicants for broadcast station authorizations are required to provide as to proposed community issue-oriented programming. Specifically, petitioners request the Commission to declare that applicants for new broadcast station authorizations or for transfer or assignment of existing broadcast station authorizations are required to show "most significant community issue-oriented programming for an example quarterly period, with full information as to the duration, type and time of presentation of such programming." Petitioners claim that the Commission cannot make the statutorily required "public interest" finding prior to grant of the application in the absence of such information.

2. After careful review of the petition, we remain convinced that the current programming information requirement is fully consistent with the mandates of the Communications Act. Accordingly, we reject the specific information requirement advanced by petitioners. We will, however, take this opportunity to reaffirm that new, transfer and assignment applicants are required to provide a brief description of their planned programming service relating to issues of public concern facing the proposed service areas.

PETITION FOR DECLARATORY RELIEF

3. In support of their request for declaratory relief, petitioners note that under Section 309(a) of the Communications Act of 1934, as amended, the Commission is required to determine whether the public interest, convenience and necessity will be served by the grant of an application for a new station or for transfer or assignment of an existing authorization.[1] Petitioners maintain, citing the Commission's radio and television deregulation orders,[2] that issue-oriented programming responsive to the community is the essence of the public interest obligation. According to petitioners, the Commission, however, no longer is able to make the required public interest determination because it receives insufficient programming information upon which to base an affirmative finding. Petitioners state that the Commission has permitted applicants "to provide a 'brief narrative description' of proposed programming and public service efforts which can be only one sentence long with no specifics as to types or amounts of programming." [3]

4. Petitioners assert that the Commission must obtain certain information as to community issue-oriented programming, including how much and what type of programming is planned and when such programming will be aired, because this is the focus of the present overall scheme of broadcast regulation. They cite the statement of the U.S. Court of Appeals (D.C.) in *Office of Communication of the United Church of Christ v. FCC* [4] that the obligation to provide community issue-oriented programming "simply cannot be fulfilled without licensees airing some irreducible minimum amount of broadcast minutes." Petitioners also assert that a licensee proposing an hour a day of issue-oriented programming during "graveyard hours" would not be meeting its public trustee obligations.

5. Petitioners contend that the present requirement not only precludes the Commission from making the required public interest determination, but prevents members of the public from demonstrating prior to the initial grant that the applicant will not serve the public interest over the length of the license term. They maintain that it is impossible to file a petition to deny with the specificity required under Section 309(d)(1) of the Communications Act[5] because the public is not able to assess the applicant's plans as to the amount, type or airtime of its issue-oriented programming.

6. Petitioners, therefore, urge the Commission to require that an applicant's Program Service Statement include "the proposed most significant treatment of community issues during an example three month period, including when the applicant proposes to air it (whether during the 6:00 am to midnight period or at other times); how much the applicant roughly proposes; and the most significant issues relevant to the community of license the applicant proposes to address (including a description of the type of programming which will be use to air such issues)." They request that television applicants also be required to state how much issue-oriented programming will be aired during prime time.

DISCUSSION

7. In the radio and television deregulation orders, the Commission shifted its attention from the mechanics of the formal ascertainment process and quantitative programming guidelines to the continuing substantive obligation of broadcast licensees to discover issues in their communities and to provide responsive programming. In those orders, the Commission concluded that formal ascertainment requirements and quantitative guidelines as to the duration, type and time of presentation of nonentertainment programming were no longer a necessary or appropriate means by which to ensure station operation in the public interest, and that their elimination would provide licensees with increased flexibility in meeting the changing needs of their communities.[6] The Commission also determined that it would afford licensees additional flexibility by permitting them to consider the programming of other stations in the same service when selecting their issue-responsive programming.

8. In implementing these determinations, the Commission adjusted its information requirements to the revised scheme of regulation. The Commission deleted rules requiring maintenance of comprehensive program logs, and implemented the issues/programs list requirement "as a means of providing the public and the Commission with the information necessary to monitor licensees' performance under the new regulatory scheme."[7] Questions in application forms pertaining to the former ascertainment requirements and quantitative programming guidelines were deleted,[8] and the Commission determined that new, transfer and assignment applicants need only provide a programming proposal directed to the new focus on community issue-responsive programming. Accordingly, under the revised scheme, applicants are now asked to provide "a brief description, in narrative form, of the planned programming service relating to the issues of public concern facing the proposed service area."[9]

9. Petitioners now contend that the information requirement for new, transfer and assignment applicants must be construed to require a specific showing of proposed community issue-oriented programming, including information as to the duration, type and time of presentation of such programming, to bring the requirement into compliance with the mandates of the Act. We do not agree. Petitioners seek to require of applicants an information showing equivalent to the showing produced by licensees on a quarterly basis to document actual compliance with their issue-responsive programming obligations. Petitioners apparently believe that this showing would enable the Commission and the public to determine at the initial authorization stage whether an applicant will fulfill those obligations. However, as the Commission has consistently recognized, a programming proposal is merely a prediction of future service and cannot serve the function envisioned by petitioners.[10] In addition, to the extent the information requirement urged by petitioners is directed at determining the adequacy of an applicant's ascertainment efforts or at establishing specific programming promises as to the type, amount and time of broadcast of programming from which to later evaluate or measure the licensee's performance, it is patently inconsistent with the actions adopted in the deregulation orders. In those orders, the Commission deleted the formal ascertainment requirements, quantitative programming guidelines and the promise vs. performance programming standard, finding that their deletion would eliminate unwarranted regulatory costs and increase licensee flexibility in meeting the changing needs of the community. Petitioners have not demonstrated, nor do they even allege, that the present overall scheme of regulation is defective, and that a return to a system of formal ascertainment and quantitative guidelines is warranted.[11]

10. Although we do not believe the specific requirements advanced by petitioners warrant further consideration, we nevertheless believe that we should address the questions raised by petitioners concerning our implementation of the programming information requirement. As noted above, petitioners cite several applications that have been filed with the Commission which contain a programming proposal written in general terms, without specific information as to the type and duration of proposed programming,[12] or which do not contain a programming service proposal, the applicant believing that none was required under our deregulation orders.

11. First, we note that the grant of an application that lacked a program service statement altogether resulted solely from inadvertent processing error. A programming service proposal clearly is required.[13] Second, we believe it is clear that applicants are not required to provide the Commission with detailed programming proposals. In directing applicants to provide only a brief narrative description of their proposed programming service, the Commission tailored the information requirement to the revised regulatory scheme. Given the shift in focus from ascertainment methodology and quantitative programming guidelines to the substantive obligation to provide responsive programming,[14] the Commission deleted the previous requirement for applicants to submit detailed programming proposals that documented the applicant's ascertainment efforts and established "promises" from which to later measure a licensee's performance. In its place the Commission implemented the requirement, consistent with the new flexibility accorded licensees, that applicants provide a brief narrative description of their proposed community issue-responsive service. The programming proposal currently required of applicants is intended, essentially, to satisfy the Commission that applicants are cognizant of the Commission's policies, and to serve as a representation that they will comply with them.[15] In describing their proposed service, applicants may indicate an intent to provide service to an unserved significant segment of the community or propose to meet the needs of the community in general. To mandate a specific, detailed proposal from applicants would be inconsistent with the flexibility afforded licensees to adapt programming to changing marketplace incentives without regulatory intrusion.

12. In support of their assertion that the Commission's implementation of the requirement is defective, petitioners cite the statement of the Commission in *Deregulation of Radio* that, "in situations where applicants are being considered without comparative challenge, any interested party will have the applicant's program proposal and be in a position to judge the responsiveness of that proposal." 84 FCC 2d at 998. As indicated above, each applicant must supply sufficient information to indicate that it is aware of and intends to be responsive to the applicable regulatory requirements including particularly those set forth in the radio and television deregulation proceedings. To the extent that the quoted statement can be read to imply that a specific, detailed programming proposal is required, we believe it is inconsistent with the action adopted in the order and the Commission's general approach to programming regulation. We remain, moreover, unpersuaded that a more detailed or elaborate "mock-up" of an applicant's intentions would be useful either to the Commission or to other interested parties. At this stage in the process, the Commission is properly concerned with whether an applicant is committed to compliance with the Commission's rules and policies and not with what particular programs and formats will be broadcast, what specific issues may be ascertained to warrant coverage, and what quantity of what type of programming is projected for broadcast. To require information sufficient to make possible a complete broadcast programming "compliance audit," in some cases several years in advance of a station's commencing operation would, even if theoretically possible, be not only burdensome but inconsistent with the notion that a licensee's decisions in this area should be dynamic, taking into account not only issues as they arise but how these issues are addressed by others in the market as well.

Programming *per se* has rarely been an issue with respect to the new station applicant since our 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Moreover, the Commission's review of program format, ascertainment procedures, and quantified programming obligations have all either been eliminated or moved to later stages in the regulatory process in order to reduce speculation and focus on more objective factual issues. As clearly recognized in *Office of Communication of the United Church of Christ v. FCC* :

> In modifying its policy, the Commission has chosen to value most highly the goal of preserving licensee discretion and flexibility in selecting the types of programming which are responsive to community issues. Seeking to maximize the journalistic discretion of licensees, especially in the constitutionally sensitive area of informational programming, is clearly consistent with the Commission's statutory duty to "chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." 707 F.2d at 1432 (citation omitted).

13. The Commission's approach also is consistent with the Commission's generally cautious view of programming proposals and its programming regulation in general. The Commission recognized the difficulties inherent in evaluating and comparing programming plans over 20 years ago, and has limited its reliance on mere proposals that are subject to change as conditions in the service area change.[16] The Commission's earlier focus on formal ascertainment requirements and general programming guidelines rather than proposed or actual programming also reflected the limitations placed upon Commission regulation of programming by the First Amendment and the prohibition against censorship contained in Section 326 of the Act.[17] The information requirement adopted and implemented by the Commission reflects those concerns.[18]

14. We also note that the Commission's concern with the relative value of ascertainment conducted long before a station would become operational led it in 1981 to change the point of review of the ascertainment documentation submitted by new television station applicants. Applicants were directed to submit their documentation with their license applications, and not with their applications for construction permit. In adopting this change, the Commission noted that significant delays in processing applications had arisen from challenges to an applicant's ascertainment, many of which could be characterized as "litigation over trivia." Ascertainment conducted between grant of the construction permit and filing of the license application would expedite the processing of applications and would result in "relatively current and more meaningful" ascertainment.[19]

CONCLUSION

15. On the basis of the foregoing, as well as our own experience in administering the approach during the past several years, we remain convinced that the current programming information requirement is appropriate under the present scheme of broadcast regulation and fully consistent with the mandates of the Communications Act. Accordingly, we will grant the petition only to the limited extent of reaffirming the present requirement.

16. Every applicant for initial construction permit or for transfer or assignment of an existing authorization is required to provide a brief description, in narrative form, of the planned programming service relating to the issues of public concern facing the proposed service area. This narrative need not take the form of the detailed programming proposal sought by petitioners, but it must be sufficient to evince an understanding on the part of each applicant of its obligation to provide programming responsive to the needs of the community.

17. Accordingly, IT IS ORDERED, THAT, pursuant to Section 1.2 of the Commission's Rules, the "Emergency Petition for Declaratory Relief" filed by the Office of Communication of the United Church of Christ, Action for Children's Television and the NOW Legal Defense and Education Fund IS GRANTED to the extent indicated herein, and in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Section 309(a) states in part:

> [T]he Commission shall determine, in the case of each application filed with it . . ., whether the public interest, convenience, and necessity will be served by the granting of such application.

[2] *See Deregulation of Radio*, 84 FCC 2d 968 (1981), *recon. denied in part*, 87 FCC 2d 797 (1981), *aff'd in part and remanded in part, Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 (1984), *recon. denied*, 104 FCC 2d 357 (1986), *aff'd in part and remanded in part, Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

[3] Petitioners cite several applications that have been filed with the Commission which do not contain a programming service proposal or which contain a proposal written in general terms indicating an intent to respond to issues of public concern through various programming services. As will be discussed, *infra*, applications must contain a brief narrative description of proposed programming plans, and, to the extent that applications do not contain such information, they may not be acted upon by the staff pursuant to delegated authority.

[4] 707 F.2d at 1433.

[5] Section 309(d)(1) states in pertinent part:

> The petition shall contain specific allegations of fact sufficient to show . . . that grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

[6] The regulatory scheme developed in the deregulation orders generally was upheld on appeal. As discussed in note 7, *infra*, the Commission's orders in the radio deregulation proceeding were remanded for further consideration of the issues/programs list requirement. *See Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985). In *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987), the court remanded the elimination of the children's television commercialization guidelines for further consideration.

[7] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 104 FCC 2d 357, 359-60 (1986). In this order and in an order adopted the same day in BC Docket No. 79-219, 104 FCC 2d 505, the Commission refined the program record keeping requirements to provide that a licensee, on a quarterly basis, must compile "a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period." The Commission took this action in response to remand of its orders in BC Docket No. 79-219. *See Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Deregulation* of Radio, 96 FCC 2d 930 (1984); *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985); *Deregulation of Radio, 104* FCC 2d 505 (1986).

[8] Prior to the Commission's orders in the deregulation proceedings, applicants for new stations or for transfer or assignment of existing authorizations were required to conduct Commission prescribed ascertainment and were directed to: (1) document the means by which they ascertained the needs and interests of the public to be served by the station; (2) describe the significant needs and interests which they believed the station would serve during the initial license term; and (3) list typical and illustrative programming that they planned to air to meet those needs and interests. In addition, they also were required to state the minimum amount of time, between 6:00 a.m. and midnight, which they planned normally to devote each week to news, public affairs, local programming and all other programs (exclusive of sports and entertainment). Procedurally, both ascertainment and nonentertainment programming issues had been the subject of staff processing criteria. The staff was required to refer to the full Commission any application containing substantial ascertainment defects that could not be resolved by further staff inquiry or action, or any proposal containing less than a specified percentage of the identified categories of programming. Transfer and assignment applications also were to be referred to the full Commission if there had been an unjustified substantial decline in programming actually broadcast from that previously proposed by the transferor or assignor.

[9] Noting that the evaluation of programming in the comparative new application process is not based on mere compliance with quantitative criteria, the Commission concluded that elimination of the guidelines would not affect the way in which programming is considered in that process. The designation of programming issues would continue to be available only where substantial or material differences exist between programming proposals. *See* Deregulation of Radio, 84 FCC 2d at 988; Commercial Television Stations, 98 FCC 2d at 1096. The Commission stated that where there is a programming issue in a comparative new application proceeding, the Commission would be "concerned with comparing the proposals made by the applicants as to which would best provide a new service to a previously unserved significant segment of the community or would best improve upon existing services." 84 FCC 2d at 988. The Commission also noted that when material differences result in comparative consideration, the focus would be the responsiveness of the program proposals and not "detailed inquiries into which or how many community leaders were contacted, by whom, *etc.*" 84 FCC 2d at 988; *see also* 98 FCC 2d at 1101.

[10] The detailed programming information required of applicants prior to deregulation generally served to document ascertainment efforts and establish "promises" from which to later evaluate a licensee under the promise vs. performance standard. Licensees could alter these promises as conditions in the marketplace changed. As discussed in paragraph 14, *infra*, the Commission, subsequent to the elimination of formal ascertainment requirements for radio in 1981, and prior to the elimination of these requirements for television in 1984, moved the point of review of ascertainment material of television station applicants from the construction permit stage to the license stage to ensure "relatively current and more meaningful" ascertainment.

[11] We note that to the extent petitioners seek to reimpose standards that were rejected in the deregulation proceedings, a petition for rule making, and not a petition for declaratory relief, would be the appropriate vehicle.

[12] Petitioners have challenged the grant of one such application. *See Family Media, Inc.*, 2 FCC Rcd 2540 (1987), *appeal pending sub nom. Office of Communication of the United Church of Christ v. FCC*, No. 87-1243 (D.C. Cir., filed June 4, 1987).

[13] *See* Section 0.283(a)(7)(A) of the Commission's Rules, 47 C.F.R. Section 0.283(a)(7)(A).

[14] In describing this obligation, the Commission stated:

> [S]tations should be guided by the needs of their community and the utilization of their own good faith discretion in determining the reasonable amount of programming relevant to issues facing the community that should be presented. The renewal standard will be retrospective in application and will contemplate a showing that during the prior license term the licensee addressed community issues with programming. The licensee need not demonstrate that it provided news programs, agricultural programs, etc. It need only show that it addressed community issues with whatever types of programming that it, in its discretion and guided by the wants of its listenership, determined were appropriate to those issues.
>
> *Deregulation of Radio*, 84 FCC 2d at 983 (footnote omitted).

[15] Thus, for example, in the case cited *supra* note 12 involving an assignment application filed in 1986, we found the following programming proposal to satisfy these objectives:

> The Assignee intends to offer programming relating to the issues of public concern facing the community of Baltimore. These issues will be addressed through a variety of non-entertainment and public affairs programming. The balance of the station's schedule will offer a unique format of twenty-four hour informational and entertainment programming.
>
> The Assignee will also comply with the Fairness Doctrine in presenting programming which deals with issues of a controversial nature of public importance, will comply with the Commission's rules applicable to political candidates, and with the quarterly issues and programs list requirement.

[16] When the Commission extricated itself from the practice of regularly comparing programming proposals in the comparative new licensing process, it stated:

> Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance.
>
> *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 397 (1965) (no comparative programming issue ordinarily designated; issue to be added only if substantial and material differences exist between proposals).

[17] *See Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 44 FCC 2303, 2314-17 (1960).*

[18] As previously noted, petitioners contend that it is impossible to file a petition to deny with the specificity required under Section 309(d)(1) of the Communications Act with respect to proposed programming service because the public is not able to assess the applicant's plans as to the amount, type or airtime of its issue-oriented programming. This argument lacks merit, however, because as we have explained, detailed information on such matters is not essential to the public interest judgment that must be made before we can grant an initial or assignment or transfer application. Rather, as noted, in this context, the Commission is primarily interested in assuring that the applicants are aware of, and intend to comply with, rules governing programming service. The information filing requirements, as explained herein are, we believe, sufficient to enable both the Commission and petitioners to assess an applicant's compliance with these objectives so the required public interest finding can be made.

[19] *See Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381, 383 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Rules
Concerning Titles and Numbers of
Commission Application Forms.

ORDER

Adopted: September 2, 1988; Released: September 13, 1988

By the Chief, Mass Media Bureau:

1. In this *Order*, the Commission updates its Rules to reflect recent changes in the numbers and titles of broadcast application forms. This information is revised as part of the Agency's oversight function. Specifically, Forms 349-L and 349-P have been deleted, and replaced with Forms 349, and 350; Form 701 has been replaced *as a broadcast form* by Form 307; and Forms 346 and 347 have new titles. Finally, as announced in an earlier *Order* (52 FR 47569, December 15, 1987) Form 330-P has been replaced by Form 330. 47 CFR Sections 73.3500, 73.3533, 73.3534, 73.3536, 74.939, and 74.951 are accordingly amended.

2. This *Order* makes no substantive changes which impose additional burdens or remove provisions relied upon by licensees or the public. We conclude, for the reasons set forth above, that these revisions will serve the public interest.

3. These amendments are implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. Because these amendments involve rules pertaining to agency organization, do not impose any additional burdens, and raise no issue upon which comments would serve any useful purpose, prior notice of rule making, effective date provisions, and public procedure on such matters are not required under the Administrative Procedure Act, 5 U.S.C. Section 553.

4. Because a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

5. Therefore, IT IS ORDERED, That pursuant to Sections 4, 5, and 303, of the Communications Act of 1934, as amended, and Sections O.61 and 0.283 of the Commission's Rules, Parts 73 and 74 of the FCC Rules and Regulations ARE AMENDED as set forth below, effective upon publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

APPENDIX

47 CFR Parts 73 and 74 are amended as follows:

1. The authority citation for Parts 73 and 74 continues to read as follows: Authority: 47 U.S.C. Sections 154 and 303.

2. Section 73.3500, Application and report forms, is amended by removing:

Form Number and Title

349-L Application for an FM Booster Station License.

349-P Application for Authority to Construct or Make Changes in an FM Booster Station.

701 Application for Extension of Construction Permit or to Replace Expired Permit.

and by adding:

Form Number and Title:

349 Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station.

350 Application for an FM Translator or FM Booster Station License.

307 Application for Extension of Broadcast Construction Permit or to Replace Expired Construction Permit.

Finally, the titles of Forms 346 and 347 are revised to read as follows.

Form number and Title:

346 Application for Authority to Construct or Make Changes in a Low Power TV, TV Translator or TV Booster Station.

347 Application for a Low Power TV, TV Translator or TV Booster Station License.

3. Section 73.3533 is amended by revising paragraphs (a)(4), (a)(6), (a)(7), and (b) to read as follows:

§73.3533 Application for construction permit or modification of construction permit.

(a) * * *

(4) FCC Form 330, "Application for Authorization to Construct New or Make Changes in an Instructional Television Fixed and/or Response Station(s), or to Assign or Transfer Such Station(s)."

(5) * * *

(6) FCC Form 346, "Application for Authority to Construct or Make Changes in a Low Power TV, TV Translator or TV Booster Station."

(7) FCC Form 349, "Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station."

(b) The filing of an application for modification of construction permit does not extend the expiration date of the construction permit. Extension of the expiration date must be applied for on FCC Form 307, in accordance with the provisions of §73.3534.

4. Section 73.3534 is amended by revising paragraphs (a) and (e) to read as follows:

§73.3534 Application for extension of construction permit or for construction permit to replace expired construction permit.

(a) Application for extension of time within which to construct a station shall be filed on FCC Form 307, "Application for Extension of Broadcast Construction Permit or to Replace Expired Construction Permit." The application shall be filed at least 30 days prior to the expiration date of the construction permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases, an application will be accepted upon a showing satisfactory to the FCC of sufficient reasons for filing within less than 30 days prior to the expiration date.

* * * * *

(e) Application for a construction permit to replace an expired construction permit shall be filed on FCC Form 307. Such applications must be filed within 30 days of the expiration date of the authorization sought to be replaced. If approved, such authorization shall specify a period of not more than 6 months within which construction shall be completed and application for license filed.

5. Section 73.3536 is amended by revising paragraphs (b)(5) and (6) to read as follows:

§73.3536 Application for license to cover construction permit.

(a) * * *

(b) * * *

(5) FCC Form 347, "Application for a Low Power TV, TV Translator or TV Booster Station License." (6) FCC Form 350, "Application for an FM Translator or FM Booster Station License."

6. Section 74.939, Special rules governing ITFS response stations, is amended by revising the reference to FCC Form 330P, in paragraph (b), to FCC Form 330.

7. Section 74.951 is amended by revising the introductory text to read as follows:

§74.951 Modification of transmission systems. Formal application on FCC Form 330 is required for any of the following changes or modifications of the transmission systems:

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Correction of Part 73 of the
Commission's Rules

ORDER

Adopted: September 2, 1988; Released: September 13, 1988

By the Chief, Mass Media Bureau:

1. In this *Order*, the Commission updates its Rules to correct certain errors which currently appear in Title 47 of the Code of Federal Regulations. Specifically, the Commission makes editorial changes to 47 CFR Sections 73.3517, 73.3597, and 73.3615, as reflected in the attached appendix. This information is revised as part of the Agency's oversight function.

2. This *Order* makes no substantive changes which impose additional burdens or remove provisions relied upon by licensees or the public. We conclude, for the reasons set forth above, that these revisions will serve the public interest.

3. These amendments are implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. Because these amendments involve rules pertaining to agency organization, do not impose any additional burdens, and raise no issue upon which comments would serve any useful purpose, prior notice of rule making, effective date provisions, and public procedure on such matters are not required under the Administrative Procedure Act, 5 U.S.C. Section 553.

4. Because a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

5. Therefore, IT IS ORDERED, That pursuant to Sections 4, 5, and 303, of the Communications Act of 1934, as amended, and Sections O.61 and 0.283 of the Commission's Rules, Part 73 of the FCC Rules and Regulations IS AMENDED as set forth below, effective upon publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows: Authority: 47 U.S.C. Sections 154 and 303.

2. Section 73.3517, paragraph (a) is corrected to read as follows:

§73.3517 Contingent applications.

* * * * *

(a) Upon filing of an application for the assignment of a license or construction permit, or for a transfer of control of a licensee or permittee, the proposed assignee or transferee may, upon payment of the processing fee prescribed in Subpart G Part 1 of this chapter, file applications in its own name for authorization to make changes in the facilities to be assigned or transferred contingent upon approval and consummation of the assignment or transfer. * * *

* * * * *

3. Section 73.3597 is amended by revising paragraph (c)(3)(ii) to read as follows:

§73.3597 Procedures on transfer and assignment applications.

* * * * *

(c) * * *

(3) * * *

(ii) When the seller is to receive reimbursement of his expenses, the applications of the parties shall include an itemized accounting of such expenses, together with such factual information as the parties rely upon for the requisite showing that those expenses represent legitimate and prudent outlays made solely for the purposes allowable under paragraph (c)(2) of this section.

* * * * *

4. Section 73.3615 is amended by revising paragraph (e) to read as follows:

§73.3615 Ownership reports.

* * * * *

(e) * * * The Ownership Report of the permittee shall give the information required by the applicable form.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. I-T-C-88-048

Application for authority to establish channels of communications between the U.S. and INTELSAT Atlantic and Pacific Ocean satellites for provision of SCPC audio services

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: September 1, 1988; Released: September 13, 1988

By the Chief, International Facilities Division:

1. The Commission is considering an application, filed on December 10, 1987 by IDB Communications Group, Inc. (IDB), requesting authority pursuant to Section 214 of the Communications Act of 1934, to establish channels of communication between the U.S. and INTELSAT Atlantic and Pacific Ocean satellites for provision of Single Channel Per Carrier (SCPC) audio services between the U.S. and international points. IDB states that it will use existing earth stations or construct new earth stations for which authority will be sought pursuant to Title III of the Communications Act. The application was placed on public notice on December 16, 1987. No comments were received.

2. The applicant requests the same blanket authority to provide SCPC audio services as it now holds for provision of IBS and International Television services.[1] A grant of blanket authority would be consistent with that decision and in the public interest. The applicant does have the requisite qualifications to provide SCPC audio service to international points. It appears that SCPC audio service is similar in nature to international television service which has been authorized on a blanket basis for many years without any problems arising because of the broadness of its scope. We find that a grant of blanket Section 214 authority for SCPC audio service will serve the Commission's administrative convenience by rendering applications for each new point to be served unnecessary. Such regulatory control as is necessary can be maintained through our regulation of Comsat, both in licensing additional points to be served and by tariff review.[2]

3. For the foregoing reasons, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision by IDB of SCPC audio services between earth stations that are now or may be licensed to IDB in the future and appropriate INTELSAT satellites.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-048 IS GRANTED, and IDB is authorized to establish channels of communication between U.S. earth stations and appropriate INTELSAT satellites for the provision of SCPC audio services between the U.S. and those countries that now or hereafter will be listed in Comsat's tariff provisions for the space segment component of SCPC audio services. Provided, however, that this blanket Section 214 authorization is without commitment as to the Commission's action on any earth station Title III applications for SCPC audio services which may be filed in the future.

5. The Section 214 authorization granted herein is effective on the adoption of this order and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, this authorization will continue in effect until Commission action on the applications.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of any necessary operating agreements between the applicant and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of its execution.

7. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Memorandum Opinion, Order and Authorization, released December 31, 1986, DA 86-412, File No. I-T-C-87-013.

[2] International Television Services, *see* AT&T *et al.*, 18 FCC 2d 402 (1969) and ITTWC et al., 76 FCC 2d 26 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BURLINGTON TELEPHONE COMPANY — File No. I-T-C-88-159

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 2, 1988; Released: September 13, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on June 22, 1988 by Burlington Telephone Company (BTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on July 13, 1988. No comments were received.

2. The applicant is already providing domestic resale services. It now proposes to compete with other carriers already providing international switched voice services. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by BTC.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-159 IS GRANTED, and BTC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. Nos. 1 and 2, between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between BTC and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that BTC shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 31, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH' S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR SYNCHRONOUS PROTOCOL PROCESSING SERVICES

On August 19, 1988, BellSouth's operating companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth) filed a Comparably Efficient Interconnection (CEI) plan to provide synchronous protocol processing services integrated with basic services. BellSouth proposes to provide protocol conversions between disparate synchronous protocols or between synchronous and asynchronous protocols, thus ensuring that customers have an efficient, economical, and competitive solution to their data transport needs. BellSouth states that it will make available to customers its Public Packet Switching Network (PPSN), which is capable of providing data transport services to customers whose terminals and host computers operate on a variety of synchronous protocols. BellSouth states it will add new protocols as new equipment becomes available or as manufacturers release specifications for additional synchronous protocols. While the Plan does not cover asynchronous/X.25 and asynchronous/X.75 conversions, to the extent that BellSouth is already permitted to collocate the equipment for those services in its central offices, BellSouth claims that approval of this Plan will permit the marketing of those services, as well as the others it describes, on an unseparated basis.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before BellSouth can begin implementing the proposed services.

According to BellSouth, it will account for the joint and common costs of this service pursuant to its Part 32 cost allocation manual that the Commission has conditionally approved (3 FCC Rcd 128 (1988)) pursuant to the *Joint Cost Order* (2 FCC Rcd 1298 (1987)). BellSouth also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on this plan by **September 30, 1988,** and reply comments by **October 14, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy of each pleading should be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. Copies of BellSouth's CEI plan can be obtained from ITS, (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 2, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON ROCHESTER'S PETITION FOR WAIVER OF SECTIONS 69. 605(c) (2) OF THE COMMISSION'S RULES

On August 19, 1988, Rochester Telephone Corporation (Rochester) filed a petition for waiver of Section 69.605(c)(2) of the Commission's Rules. Those rules require that a telephone company concur in all National Exchange Carrier Association (NECA) tariffs in order to be deemed an average schedule company. Currently, Rochester owns and operates eight local exchange carriers; four of these companies (and one to be acquired "prior to the end of 1988") are average schedule companies. However, Rochester intends to withdraw all of its affiliated carriers from the NECA carrier common line (CCL) pool and file a single interstate common line tariff effective April 1, 1989. The requested waiver would authorize Rochester to file a common line tariff that permits "Rochester's average schedule exchange carrier subsidiaries to continue to settle on an average schedule basis in a pool of Rochester's exchange carrier affiliates" after their withdrawal from the NECA CCL pool. Rochester states that grant of the waiver would allow the affected companies to continue to develop costs and revenue requirements " in accordance with current NECA schedules and to receive compensation from the Rochester pool on the same basis." Rochester states that grant of this waiver would also permit affiliated "average schedule" companies to continue to participate in NECA's traffic sensitive (TS) tariff on an average schedule basis after March 31, 1989. Rochester states that the requested waiver is designed to facilitate its implementation of a common line tariff for all of its affiliated exchange carriers and minimize the disruptive effect of the transition on its average schedule affiliates.

According to Rochester, the requested waiver would be in the public interest. Absent the waiver, Rochester states that these average schedule companies would be required to perform costly jurisidictional separated cost studies for the first time. Rochester states that those studies would increase the expenses that the affected carriers would have to recover through interstate charges. Rochester believes that there would be no adverse affect on other unaffiliated exchange carriers because the average schedule companies would pool and settle with affiliated companies. Rochester claims that "the inclusion of the costs of these average schedule companies is expected to have relatively modest impact on the averaged CCL rate assessed by the exchange carriers participating in Rochester's CCL tariff."

Rochester states that grant of the waiver is consistent with the flexibility the Commission recently granted average schedule companies seeking to withdraw from the NECA TS pool. There would be greater flexibility in establishing the rates for interstate access service. Rochester notes, because the affected average schedule companies would charge the Rochester CCL charge rather than the NECA charge. Rochester requests expedited treatment of this petition in order to permit adequate time to prepare its 1989 Annual Access Tariff.

Interested parties should file comments on Rochester's petition by **September 22, 1988,** and reply comments by **October 3, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Rochester's petition can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 2, 1988

PLEADING CYCLE ESTABLISHED ON SWBT'S PETITION FOR WAIVER OF CERTAIN CEI REQUIREMENTS FOR ENHANCED SERVICES TRIALS (CC DOCKET NO. 85-229, PHASES I AND II)

On August 24, 1988, Southwestern Bell Telephone Company (SWBT) filed a petition for waiver of certain comparably efficient interconnection (CEI) requirements for trials of enhanced services. SWBT seeks permission to conduct enhanced voice and data gateway trials. According to SWBT, the gateway trials will be the first of their kind in the United States, and will involve mass market applications to test the general appeal and viability of gateway services. SWBT proposes to conduct technical and market trials of its gateway for about one year within a metropolitan area in its territory beginning on March 1, 1989. The technical trials will focus on the functional characteristics of the enhanced service equipment and how it interfaces within the network. The market trials will focus on the market characteristics of a new enhanced service.

SWBT believes that "full" CEI requirements are not necessary for its enhanced service trials. Therefore, in lieu of filing a CEI plan, SWBT proposes five conditions under which it should be able to conduct both technical and market trials for gateway services:

(1) The trials will be of a reasonably limited duration (*e.g.*, approximately one (1) year).

(2) All enhanced service trial costs will be treated in full accordance with SWBT's approved Cost Allocation Manual.

(3) SWBT will in no way assure end user trial participants that it will be offering the enhanced service at some future time.

(4) SWBT will not make any assurances to end user trial participants regarding what price SWBT will charge for the enhanced service if ever offered by SWBT.

(5) SWBT will make any special underlying basic service facilities involved in its trial available to a reasonable number of other ESPs [enhanced service providers] during the trial period, under the same terms, conditions and costs, and generally in the same central offices, on a first-come, first-served basis.

In its waiver peitition, SWBT also requests the Commission to address the general issue of whether or not the Bell Operating Companies (BOCs) are required to file CEI plans with the Commission before conducting enhanced services trials. SWBT contends that the the Commission's *Computer III* orders and other orders that approved BOCs' research and development cost allocation plans did not specifically address the issue of trials. According to SWBT, BOCs should be able to conduct trials for any enhanced service subject to the five conditions it proposes for its gateway trials.

Interested parties should file comments on SWBT's petition by **September 23, 1988,** and reply comments by **October 7, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of SWBT's petition can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-421

In re Applications of

COLUMBUS BROADCASTING CORPORATION (hereafter Columbus)	File No. BPH-870514ME
O'LEARY BROADCASTING, INC. (hereafter O'Leary)	File No. BPH-870514MH
WILLIAM HENRY SAURO (hereafter Sauro)	File No. BPH-870514MI
COLUMBUS RADIO, LTD. (hereafter CRL)	File No. BPH-870515MG
MID-OHIO/CAPITAL COMMUNICATIONS LIMITED PARTNERSHIP (hereafter Mid-Ohio)	File No. BPH-870515MK
SCIOTO BROADCASTERS, LIMITED PARTNERSHIP (hereafter Scioto)	File No. BPH-870515MU
MID-OHIO RADIO LIMITED (hereafter Radio)	File No. BPH-870515NM
CLEAR CHANNEL COMMUNICATIONS, INC. (hereafter Communications)	File No. BPH-870515NN
HORACE E. PERKINS (hereafter Perkins)	File No. BPH-870515NP
MARK ALLEN BURCHETT (hereafter Burchett)	File No. BPH-870515NQ
MCCALL BROADCASTING, INC. (hereafter McCall)	File No. BPH-870515NU
COLUMBUS RADIO LIMITED PARTNERSHIP (hereafter CRLP)	File No. BPH-870515NY

For Construction Permit
for a New FM Station on
Channel 298A in Columbus, Ohio

HEARING DESIGNATION ORDER

Adopted: August 15, 1988; Released: September 14, 19

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

PRELIMINARY MATTER

2. **Financial Considerations.** Pursuant to authority conferred by the Commission (*Public Notice*, FCC 87-97 released March 19, 1987), the Chief, Audio Services Division by letter of June 11, 1987, required all applicants to this proceeding to establish their respective financial qualifications to construct and operate their respective proposals as well as any other pending proposals for new stations. All applicants complied, and each provided showings supporting their respective financial qualifications. Each showing has been reviewed, and the results of our review will be detailed below.[2]

3. In completing review of each financial showing, it should be pointed out that we factored in common costs to be met by all applicants to this proceeding. Specifically, to the extent that each applicant, by virtue of its mutual exclusivity, is a party to a hearing proceeding, we have added where necessary an estimated figure of 5,000 for legal costs (or the difference between the applicant's projected legal costs and our estimated figure). [3] Further, where necessary, we have also factored into each financial showing an additional 6,000. This figure represents the hearing fee required by each applicant who wishes to continue as a participant to this proceeding. *See, Report and Order* in General Docket 86-285, 2 FCC Rcd 947 (1987). As a result of these additional costs, our cost estimates may be somewhat higher than those projected by the applicants themselves.

4. **Columbus.** The construction and operation costs for the applicant's proposed facility will require 708,000. The applicant plans to finance construction and operation of the proposed station by obtaining a bank loan in the amount of 750,000 from Bank One, Cleveland, Ohio. While the loan amount will amply meet the total construction and operating expenses, Columbus has failed to demonstrate its ability to meet the non-refundable loan origination fee of 11,250. Payment of the loan origination fee is a condition to the receipt of the bank financing. The applicant has failed to demonstrate that at the time of filing (May 14, 1987) it possessed the necessary funds to meet the loan origination fee. Therefore, a question is raised as to whether Columbus falsely certified that it had sufficient net liquid assets on hand at the time of the filing of its application. Based on the above, we are unable to find that Columbus is financially qualified. Accordingly, an appropriate issue will be specified.

5. Additionally, in several instances throughout its response, Columbus has indicated that cost estimates *(i.e.* acquisition and installation of equipment, and legal and engineering costs) were confirmed by letters to its president dated May 7, 1987. Columbus, as with all applicants to this proceeding, was instructed to provide documentation in support of its responses, but failed to provide copies of the May confirmation letters. Accordingly, within 30 days of the release of this Order, Columbus will be required to submit to the presiding Administrative Law Judge an amendment containing the May 7, 1987 confirmation letters.

6. **O'Leary.** Construction and operation of the applicant's proposal will require costs of 458,500. The applicant proposes to finance construction and operation with a 500,000 loan from the State Street Bank and Trust Company, Boston, Massachusetts. The bank commitment letter appears to be sufficient to the extent that it provides the necessary reasonable assurances of the availability of the funds. As security for the loan, the bank would require a pledge of all partnership interests, the personal guaranties of all principals, and the creation of a lien on the station's physical plant. However, the applicant has failed to document that it will meet the bank's security requirements. Rather than specify an issue for this single deficiency, we will afford the applicant the opportunity to file an amendment to correct this deficiency. *Country Broadcasting Co.*, 71 FCC 2d 1222, 1233 (Rev. Bd. 1979); *Gilbert Broadcasting Corp.*, 68 FCC 2d 186, 204 (Rev. Bd. 1978), *rev'd on other grounds* 91 FCC 2d 450 (1982); *Parkell Broadcasting, Inc.*, 59 FCC 2d 811, 814 (1976), *aff'd*, Case No. 76-1556, June 7, 1977; *Cf. Vernon Broadcasting*, 12 FCC 2d 946 (1968) (several financial deficiencies discovered in addition to the lack of personal guarantee). Accordingly, within 30 days of the release of this Order, the applicant will be required to submit to the presiding Adminstrative Law Judge an amendment containing the requisite guarantees meeting the bank's security requirements. Absent the submission of supporting documentation, an appropriate issue may be specified by the presiding Administrative Law Judge.

7. **Sauro.** The applicant has indicated that he plans to finance construction and operation with cash. A determination of whether he possesses the ability to finance the proposed station in this manner is hindered due to the incomplete data provided regarding construction and operation expenses. Sauro has failed to provide cost estimates associated with acquiring land; remodeling or constructing buildings; legal expenses; engineering expenses; or miscellaneous expenses. Further, the cost figures provided are not accompanied by the appropriate documentation, and are so unreasonably low in comparison to the competing proposals as to require thorough scrutiny in the context of a hearing.[4] *See, United Broadcasting Co.*, 93 FCC 2d 482 (1983).

8. Even if the cost figures as submitted were acceptable, we estimate that Sauro would require 102,500 for construction and operation. Sauro plans to finance the costs from existing capital. To determine the amount available for construction and operation, we are required to review the applicant's balance sheet and measure whether its liquid assets are sufficient to meet its current liabilities. Any amount in excess of the current liabilities would be considered available for construction and operation. The balance sheet provided by Sauro, representing the net worth of he and his wife, fails to demonstrate the availability of liquid assets sufficient to meet the minimal construction and operation costs estimated above. While the Sauro balance sheet indicates the existence of assets in the amount of 4,825,073, under the Commission's financial guidelines, only 454,073 can be considered liquid assets.[5] Turning to the liabilities, the balance sheet does not segregate the current or long term liabilities, and indicates the existence of liabilities in the amount of 625,749. When an applicant fails to so segregate its liabilities we must assume that all liabilities listed are current. Accordingly, the Sauro balance sheet does not demonstrate the availability of sufficient liquid assets in excess of current liabilities. Moreover, the balance sheet does not demonstrate that Sauro possesses the necessary personal resources to meet construction and operation costs. Hence, an appropriate issue will be specified.

9. Sauro, as with all applicants to this proceeding, was instructed to demonstrate the availability of sufficient financial resources to construct and operate simultaneously all stations for which it had applications pending. *Nelson Broadcasting*, 4 RR 2d 87 (Rev. Bd. 1964); *Sawnee Broadcasting Co.*, 3 FCC 2d 561 (1966). Sauro has indicated the pendency of an application for a new FM station in Tucson, Arizona (BPH-870515MZ), but financial information relating to construction and operation costs associated with the proposed facility has not been provided. Accordingly, within thirty days of the relase of this Order, the applicant will be required to provide the presiding Administrative Law Judge with the construction and operation costs attendant to the Tucson application. Moreover, for the purposes of administrative efficiency and conservation of Sauro's resources, an appropriate issue will also be specified allowing the financial issue to be tried in this proceeding with respect to the Tucson application as well. *See, Melvin Jones*, 2 FCC Rcd 5581, 5582 (Vid. Serv. Div. 1987).

10. **CRL.** We estimate that CRL will require 530,550 to meet its construction and operation costs. The applicant intends to meet these costs through the personal assets of the general and limited partner. The general partner, James H. Sumpter, Jr., has committed to provide 30,000, and the limited partner, Arnold Malkan, has committed to provide the remainder. Only Mr. Sumpter, has provided the requisite balance sheet in support of his commitment.

11. Review of Mr. Sumpter's balance sheet indicates the availability of liquid assets of 4,000 in cash and 26,028 in "marketable securities",[6] versus current liabilities of 24,100. Thus, Mr. Sumpter has demonstrated the availability of net liquid assets of only 5,928 to fulfill the 30,000 funding commitment. The remainder of the funding is to be supplied by Mr. Malkan, who indicated in a statement of January 28, 1988, that he possesses in excess of 750,000. This statement is unacceptable to demonstrate Mr. Malkan's ability to provide the committed funds. The Commission requires that all persons (with the exception of financial institutions) who have agreed to furnish funds must submit a balance sheet or, in lieu thereof, a financial statement showing all liabilities and containing current and liquid assets sufficient in amount to meet current liabilities. *See, Las Americas Communications, Inc., supra.* The Commission has indicated that a mere statement of total assets and total liabilities, failed to demonstrate the existence of sufficient personal assets to meet the necessary construction and operation costs. To that degree, an appropriate issue will be specified. *See, Lakeland Telecasters, Inc.*, 51 RR 2d 866, 871 (B/cast Bur. 1982).

12. **Mid-Ohio.** In responding to our request for verification of financial qualifications, the applicant has provided a study entitled "Broadcast Financial Projections" which appears to be a financial proposal for the construction and operation of a Class A, FM facility in Upper Arlington, Ohio. Since Upper Arlington is a suburb of Columbus, the applicant professes that this study should serve as an adequate basis for determining the construction and operation costs attendant to its proposed facility.

13. While, we agree that the study could be utilized for the purpose of estimating the construction and operation costs, we note, however, that the study is dated January 2, 1985, and is based on estimates from 1984. Therefore, in light of the age of the study, (more than two years old at the time of Mid-Ohio's filing) we must question whether the applicant's strict reliance on the cost estimates is valid. To that degree, we question whether the cost projections contained in the study are still accurate, and how the costs projected therein relate specifically to the facilities proposed by the applicant. Accordingly, an appropriate issued will be specified.

14. The validity of the costs notwithstanding, they will serve as the basis for determining Mid-Ohio's financial qualifications. After reviewing the study and the applicant's statement, we have determined that exclusive of costs associated with acquiring land and installation of equipment,[7] Mid-Ohio will require at least 662,183 to construct and operate the proposed facility.[8] The applicant intends to primarily meet the costs through the personal finances of its general, and four limited partners based on their respective proportional partnership interest. Additionally, Mid-Ohio has submitted a bank letter dated June 26, 1987, from AmeriTrust Bank, Cleveland, Ohio, which expresses an interest to loan the applicant 350,000 for the purpose of covering the costs associated with construction and operation of the proposal.

15. Analysis of the proposed methods of financing yields that Mid-Ohio secured the June 26 bank letter after the May 15, 1987 filing of its application. To the extent that a positive financial certification response to the application required financing of the proposal to be on hand at the time of the filing, the loan amount cannot be credited against the projected costs. Absent the credit of the loan amount, the financial qualifications of the applicant hinges on whether the personal finances of the partners support the projected construction and operating costs. Pursuant to their respective interests in the partnership, the general partner has the responsibility of meeting 30 percent of the costs (196,855), and the four limited partners are each responsible for 16.25 percent (106,630). At the outset, we note, that these proportional interests total only 95 percent. Hence, this financing plan will leave five percent, approximately 32,809, unsupported.

16. We have reviewed the personal balance sheets of the four partners and the financing proposal of the one remaining partner. Our review reveals that none has properly demonstrated his ability to meet his proportional share or the remaining unsupported amount. Although each partner's balance sheet or showing has been reviewed, we note that the failure of one partner to meet his financial responsibility is fatal to the successful financing of the proposal. To that degree, for the purpose of demonstrating Mid-Ohio's financial inability we need only review the balance sheet of general partner Joseph C. Hewitt.

17. Our review of Mr. Hewitt's balance sheet indica the existence of only 3,000 in acceptable liquid asse albeit the balance sheet lists securities totaling 54,000. M Hewitt's balance sheet does not indicate whether su securities are publicly traded or properly identify the sec rities by type, the issuer, the market traded, or the curre market value. Thus, we are faced with balancing M Hewitt's 3,000 in liquid assets against his current liabiliti of 17,000. Since this will produce a negative liquid n worth, Mr. Hewitt is unable to meet his proportion financial responsibility. While Mr. Hewitt has attempted mask this deficiency by indicating that to the extent th he is unable to meet his proportionate contribution he ca expect loans from the limited partners, he has failed provide loan commitment statements from any of th partners.

18. In light of the many deficiencies revealed by ou review, we are forced to question whether the applica properly certified as to its financial qualifications. Accor ingly, based on the above, an appropriate financial as wa as, misrepresentation issue will be specified.

19. **Communications.** The applicant will require 420,0 to construct and operate its proposed facilities. Moreove at the time of the filing of the proposal at hand, Comm nications additionally sought authority to construct thr FM proposals;[9] purchase KTAM(AM) and KORA(FM) Bryan, Texas; construct or proposed to construct seve Low Power Television Stations (LPTV);[10] and upgrade fi existing FM stations.[11] Including the Columbus propos the applicant will require a total financial outlay o 10,155,751. The applicant has indicated that it will mee the total costs required through the remains of an origin 45 million line of credit from The Bank of New York. I estimates that 8.2 million of the original 45 million is sti available for use. The remainder necessary will come fro Communications' estimated net liquid assets of 4 million.

20. While the applicant has provided documents which appear to verify the original 45 million loan, it has failed to document the availability of the 8.2 million remainder Further, in reviewing Communications' balance sheet, w find liquid assets of 538,042 in cash, and accounts receiv able of 3,206,325 (75% of amount listed) to be balanced against current liabilities of 697,197. Thus, the applicant's balance sheet demonstrates the existence of net liquid assets of 3,047,171. This figure is insufficient to meet the million commitment. Accordingly, the applicant has veri fied the existence of only 3,047,171 to meet the proposed funding demands of 10,155,751. In light of the foregoing an appropriate issue will be specified. Again, for the pur pose of administrative efficiency and conservation of Com munications' resources, an appropriate issue will also be specified allowing the financial issue to be tried in this proceeding with respect to all of the applicant's pending applications for new stations, including the Charleston proposal, as indicated in footnote 9. *See*, para. 9, above.

21. **Perkins.** Review of the applicant's cost estimates indicates that he will require 150,388 to complete construction and operation. We note that the applicant's cost estimates are significantly lower than the estimates provided by the other applicants to this proceeding, with the exception of Sauro and Gray. In an instance where an applicant's cost estimates are unreasonable on its face, an inquiry into the estimates is appropriate. *California Stereo, Inc.*, 39 FCC 2d 401 (Rev. Bd. 1973); *Viking Television, Inc.*, 17 FCC 2d 823 (Rev. Bd. 1969). Consistent with our

previous action with Sauro, an appropriate issue will be specified to inquire into the validity of Perkins' costs as estimated.

22. Assuming, *arguendo*, the validity of Perkins' cost estimates, he has proposed financing in the amount of 180,000. The bulk of the financing would come from a bank loan for 170,000 from The Huntington National Bank. The remaining 10,000 is committed from his personal capital. Perkins' balance sheet demonstrates the existence of liquid assets in excess of liabilities in the amount of 26,800. This amount will more than adequately meet the 10,000 commitment. On the other hand, the bank letter is deficient in that the interest rate specified for the loan is undeterminable from the contents of the letter. Specifically, the letter states that the interest rate is the bank's prime commercial rate as defined by its loan document plus two percent, however, the letter does not include or specify the rate. Consequently, we have no way of calculating the interest only monthly payments required during the first months of operation. Based on this deficiency, we must find the applicant's proposal inadequate, and specify an appropriate issue.

23. **CRLP.** To construct and operate the proposed facilities the applicant requires 228,000. It plans to finance this amount through existing capital of 90,000 and a loan from Sonrise Financial Services, Inc. (Sonrise) in the amount of 150,000. CRLP's balance sheet lists liquid assets of cash in the amount of 90,000 and liabilities totaling 101,000. Since the liabilities are not segregated as short term or long term, as stated previously, we must measure the total liabilities against the liquid assets. Consequently, the liquid assets are insufficient to meet the liabilities.

24. Sonrise has provided an adequate commitment letter sufficient to provide CRLP's with a reasonable assurance of a present firm intention to provide funds. But because Sonrise appears to be a non-financial institution, it must document its commitment with a balance sheet. The balance sheet submitted by Sonrise specifies liquid assets of cash totaling 200,000, and unsegregated liabilities totaling 205,000. Therefore, Sonrise has also failed to demonstrate the existence of sufficient liquid assets in excess of liabilities to meet the amount committed.

25. It should be noted further, that neither balance sheet provided sufficient specificity to evaluate the financial ability of either the applicant or Sonrise. Because of the inadequacy of the showing, we find that the applicant has failed to demonstrate that it can support its financial proposal. Hence, an appropriate issue will be specified.

26. **Scioto, Radio, Burchett, and McCall.** We have reviewed each of the applicant's proposals and find that based on the financial information provided, that each has demonstrated a reasonable assurance that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate their respective proposals for three months without revenue. Accordingly, we find each financially qualified.

27. **City Coverage/Line-of Sight.** Due to the irregular boundaries of Columbus, it will not be possible for any of the applicants to provide the entire community of license with a 70 dBu signal using maximum facilities for a Class A Station. Accordingly, all applicants have requested waiver of 47 C.F.R. Section 73.315. The Commission no longer requires a waiver request where an applicant proposes to include more than 80% of the community of license within the 70 dBu contour. *See Letter to Southwest Communications, Inc. from Dennis Williams, Acting Chief, FM Branch*, dated July 16, 1986, citing *John R. Hughes et al.*, 50 Fed. Reg. 5679 (1985). Our analysis confirms that the proposal of O'Leary is above the 80% coverage standard. Accordingly, the O'Leary waiver request is not necessary and will be dismissed as moot. The remainder propose principal city coverage of less than 80% of Columbus. Accordingly, an issue will be specified.[12]

28. **Columbus.** By amendment filed August 26, 1987, Columbus states that Mr. Bob Cunningham had notified applicant of his withdrawal as a stockholder (8.3%), officer and director, and that an amendment would be filed reporting the disposition of Mr. Cunningham's stock. No amendment has been filed. Accordingly, applicant shall submit the information to the presiding Administrative Law Judge.

29. **EEO.** The Commission requires that if there will be five or more fulltime employees, the applicant must complete and file an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. Scioto and Perkins have not listed any local source for attracting women job applicants. McCall has not listed any source for attracting either women or minority job applicants. Accordingly, each of the noted applicants will be required to amend their applications to provide the information.

30. **Environmental.** Since the proposals of Perkins and CRLP[13] may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, Perkins and CRLP are required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Perkins and CRLP will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

31. **McCall.** Applicant has indicated that Flint Metro Mass Media Corporation, of which Vernon Merritt is a principal officer, has pending in the Circuit Court in Flint, Michigan, an employment discrimination lawsuit filed by a former employee of its broadcast station. An appropriate condition will be specified.

32. **CRLP.** In its amendment filed July 13, 1987, CRLP attempts to certify that no limited partner will be involved in the management or operation of the proposed station. Applicant's statement does not satisfy the certification requirement of Section II, Item 3(a) of FCC Form 301. Accordingly, applicant shall submit the proper certification to the presiding Administrative Law Judge.

33. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after January 8, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
Communications	3/11/88; 7/20/88; 7/22/88

34. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

35. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding. *APPLICANTS*: O'Leary, CRL, Burchett

36. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

37. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

(Financial Issues)

1. To determine, with respect to Columbus, CRL, Mid-Ohio, Perkins, and CRLP:

(a) The basis for, and the validity of, the cost estimates projected by Mid-Ohio and Perkins to build and to operate their respective proposed facilities without revenues for three months;

(b) Whether any of the applicants, as referenced above, have sufficient net liquid assets on hand, or available from committed sources to construct and operate their respective proposed facilities for three months without revenues;

(c) Whether, in light of the evidence adduced pursuant to the foregoing issues, are any of the applicants, as referenced above, financially qualified;

(d) To determine, (i) whether, in light of the evidence adduced pursuant to issue (c) above, Columbus and Mid-Ohio made misrepresentations to the Commission, were lacking in candor in their dealings with the Commission or attempted to deceive or mislead the Commission and (ii) if issue (a), above, is resolved in the affirmative, the effect thereof on Columbus' and Mid-Ohio's basic qualifications to be a Commission licensee.

2. To determine, with respect to Sauro:

(a) The basis for, and the validity of, Sauro's cost estimates to build the two proposed FM facilities and to operate them without revenues for three months;

(b) Whether Sauro has sufficient net liquid assets on hand or available from committed sources to construct and operate the two proposed facilities for three months without revenues; and

(c) Whether, in light of the evidence adduced pursuant to the foregoing issues, is Sauro financially qualified.

3. To determine, with respect to Communications:

(a) Whether Communications has sufficient net liquid assets on hand or available from committed sources to construct and operate the four proposed facilities for three months without revenue; and

(b) Whether, in light of the evidence adduced pursuant to the foregoing issue, is Communications financially qualified.

(Other Issues)

4. To determine whether the proposal of the following applicants would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section: Columbus, Sauro, CRL, Mid-Ohio, Scioto, Radio, Communications, Perkins, Burchett, McCall and CRLP.

5. If a environmental impact statement is issued with respect to Perkins and CRLP, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

6. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: O'Leary, CRL and Burchett

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

38. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Columbus will submit copies of the May 7, 1987 cost confirmation letters to the presiding Administrative Law Judge documenting its cost estimates.

39. IT IS FURTHER ORDERED That, Columbus shall file the amendment, as specified in Paragraph 28 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

40. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, O'Leary will provide the presiding Administrative Law Judge with an amendment containing personal guarantees of all principals satisfying the bank's security requirements.

41. IT IS FURTHER ORDERED, That the O'Leary waiver request IS DISMISSED AS MOOT.

42. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Sauro will provide the presiding Administrative Law Judge with construction and operation costs for its proposed FM facility in Tucson, Arizona (File No. BPH-850715MZ).

43. IT IS FURTHER ORDERED, That Scioto, Perkins and McCall shall amend their applications as specified in paragraph 29 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

44. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Perkins and CRLP shall submit the environmental assessment required by § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

45. IT IS FURTHER ORDERED, That, in the event a construction permit is awarded to McCall as a result of this proceeding, its grant shall be without prejudice to whatever action, if any, the Commission may deem appropriate as a result of the outcome in the case noted in Paragraph 31 herein.

46. IT IS FURTHER ORDERED, That, CRLP shall file the amendment as specified in Paragraph 32 with the presiding Administrative Law Judge within 30 days of the release of this Order.

47. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicant ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Communications

48. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

49. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

50. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

51. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] By letter dated April 28, 1988, James Phillip Gray voluntarily requested that his application be dismissed (File No. BPH-870515MQ).

[2] On November 25, 1987, Columbus filed a "Petition to Dismiss Application" against the Sauro, CRL and Mid-Ohio applications. The basis for the petitions was Columbus's contention that the Sauro and Mid-Ohio financial showings, submitted pursuant to the Commission's June 11, 1987 letter, were defective and that CRL had not responded to the Commission's June 11, 1987 letter. Columbus' "Petition to Dismiss Application" is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications*; *Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered.

[3] While we are fully cognizant that the legal fees attendant to this proceeding could well exceed our estimated figure, for purposes of review this figure represents an amount that would minimally meet the legal costs for a mutually exclusive hearing proceeding.

[4] Sauro has estimated total costs of 91,500, while the estimated construction and operation costs of his competitors average 350,630.

[5] The difference is comprised of securites, real and personal property. Only publicly traded securities can be considered as current liquid assets, and Sauro has failed to demonstrate that the securities listed on the balance sheet are so traded. Real and personal property are considered non liquid assets. Generally, an applicant can only receive credit for such assets where it is accompanied by an appropriate appraisal documenting the value of the property. *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (Rev. Bd. 1986).

[6] Mr. Sumpter provided a figure of 33,464 as the value for "marketable securities", but the value of two of the securities listed could not be verified due to his failure to list the exchange on which they are traded.

[7] The study states that cost projections for equipment are inclusive of installation, however, these figures are essentially the same as the figures provided by the equipment supplier for equipment only.

[8] The applicant's projected costs were significantly lower (351,000). It appears that the primary reason for this discrepancy is the applicant's failure to include operation costs for the first three months. The study projected this figure to be 376,183.

[9] The three proposals are Charleston, South Carolina (File No. BPH-860203OP); Raleigh, North Carolina (File No. BPH-860707NV); and Des Moines, Iowa (File No. BPH-870430MA). The Charleston application was designated for hearing on Decem-

ber 14, 1987, however, a determination as to the financial qualifications of Communications in that proceeding was conditioned upon the outcome of the proceeding at hand. *See*, para 15. of *Sue A. Underwood and Brenda Stroud, a general partnership*, 3 FCC Rcd 153, 155 (Aud. Serv. Div. 1988).

[10] Pursuant to *Low Power Television and Television Translator Service*, 102 FCC 2d 295 (1984) a financial showing is unnecessary to demonstrate the financial qualifications of a LPTV applicant. Nevertheless, we feel that the amount necessary to construct the LPTV proposals are germane in reaching a determination as to the applicant's financial ability to satisfy the responsibility associated with the multiple applications. *See, Nelson Broadcasting, supra; Sawnee Broadcasting Co., supra.*

[11] Communications sought to upgrade the facilities of the following five FM stations: KJYO, Oklahoma City, Oklahoma; KHYS, Port Arthur, Texas; KAJA, San Antonio, Texas; WQUE, New Orleans, Louisiana; and KPEZ, Austin, Texas. As with LPTV applications, the Commission does not require a demonstration of financial qualifications to be included with modification applications. However, for the same reasons enunciated in footnote 10, above we have included the projected costs for the upgrades in our calculations to determine the applicant financial qualifications.

[12] CRL states that it provides principal city coverage to 88% of Columbus. However, CRL's coverage differs significantly from the other applicants having approximately the same coverage from the same site.

[13] Both proposals indicate a possible RF radiation hazard to workers or the general public. Associate's showing must include radiation from all antennae.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-423

In re Applications of

NEWSIC, INC.	File No. BPH-871022MA
Anthony Lamar Canup and George M. Pass d/b/a WHITE COUNTY BROADCASTING CO. (hereafter County)	File No. BPH-871023MN
TERRY WAYNE BARNHARDT (hereafter Barnhardt)	File No. BPH-871026MI
LINDA B. GUEST (hereafter Guest)	File No. BPH-871026MN
SARALYN B. OBERDORFER	File No. BPH-871026MP

For Construction Permit
for a New FM Station
in Cleveland, Georgia
Channel 270A (101.9 MHz)

HEARING DESIGNATION ORDER

Adopted: August 17, 1988; Released: September 14, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *County*. In Section V-B, Item 7(b)(1) of its application, County lists the height of antenna radiation center above ground level as 30 meters. In its antenna sketch, this height is listed as 97 meters. Upon review, we have determined that the former value is the correct height for the antenna radiation center above ground level. This figure was determined by subtracting the site elevation (573 meters) from the height of the antenna radiation center above mean sea level (603 meters). This discrepancy does not constitute an acceptability defect since the inconsistency can be correctly resolved using data contained elsewhere in the application. However, County will be required to file an amended tower sketch with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Other Matters*. Section II, Item 4(a) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Neither County nor Barnhardt have completed Item 4 correctly, listing post office boxes for Anthony Lamar Canup (County) and for Terry Wayne Barnhardt (Barnhardt). Accordingly, County and Barnhardt will be required to submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. The Commission requires that if there will be five or more fulltime employees, the applicant must complete and file Section VI of FCC Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Although Barnhardt and Guest filed such statements, neither statement listed any clearly-defined minority organization each proposed to utilize to attract minority job applicants. In addition, Guest failed to list a women's organization she proposed to use for recruiting purposes. Accordingly, Barnhardt and Guest will be required to submit amendments of their EEO programs to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That County must submit an amended antenna tower sketch correcting the discrepancy described in paragraph 2 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That County and Barnhardt shall submit amendments containing the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That, within thirty days of the release of this Order, Barnhardt and Guest shall submit amendments to their EEO information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge within 30 days of the release of this Order.[1]

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Mr. Barnhardt has also incorrectly listed the community of license on FCC Form 396-A as "Gainsville, Georgia."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-422

In re Applications of

RADIO DELAWARE, INC. (hereafter RDI) File No. BPH-870604MB

ADAMS BROADCASTING CORPORATION (hereafter Adams) File No. BPH-870615MO

For Construction Permit for
a New FM Station, Channel 300A,
Delaware, Ohio

HEARING DESIGNATION ORDER

Adopted: August 17, 1988; Released: September 14, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Petition to Deny*. RDI filed a petition to deny Adams' application on May 4, 1988 alleging that Adams failed to secure reasonable assurance of transmitter site availability. Notwithstanding RDI's contentions to the contrary, the staff has determined that RDI's petition is essentially a petition to specify issues. Since the Commission's *Report and Order in re*: *Revised Procedures for Processing of Contested Broadcasting Applications*: *Amendments of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in the petitions will not be considered. Accordingly, RDI's petition will be dismissed and an opportunity to raise any allegations contained therein will be afforded the parties post-designation.

3. *EEO*. In response to Section VI of FCC Form 301, both applicants indicated they will employ five or more fulltime employees. Therefore, each is required to submit the five-point Model Equal Employment (EEO) Program (FCC Form 396A). The guidelines to the Model EEO Program, paragraph IV, instruct the applicant to specify the sources that it proposes to use in recruiting minority and female applicants. However, neither RDI nor Adams provides any specific sources for recruiting minority applicants. Accordingly, RDI and Adams will be required to amend their applications by submitting specific sources of minority recruitment to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. *Principals' addresses*. Section II, Item 4 of FCC Form 301 requires that an applicant specify its address as well as the home address of each of its principals. RDI has failed to provide this information. Accordingly, RDI must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. *Late - filed amendments*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE AMENDMENT FILED
RDI	February 23, 1988; November 23, 1987
Adams	June 9, 1988

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced, pursuant to the foregoing issues, which of the applications, if any, should be granted.

7. IT IS FURTHER ORDERED, That the Petition to Deny filed by RDI IS HEREBY DISMISSED.

8. IT IS FURTHER ORDERED, That RDI and Adams shall submit data relative to paragraph IV of its EEO Program as specified in paragraph 3 above to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That RDI shall submit an amendment which contains the information required by Section Section II, Item 4 of FCC Form 301, to the presiding Adminstrative Law Judge within 30 days after the release this Order.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by RDI and Adams ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, Northwest, Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-425

In re Applications of

LANSING COMMUNITY COLLEGE	File No. BPED-870911MA
AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter Group)	File No. BPH-870914MC
MID MICHIGAN FM, INC.	File No. BPH-870914MR
WILLIAM E. KUIPER, JR. (hereafter Kuiper)	File No. BPH-870914MT
GREAT LAKES FM LIMITED PARTNERSHIP (hereafter FMLP)	File No. BPH-870914MU
DEWITT RADIO INCORPORATED	File No. BPH-870914MV

For Construction Permit
for a New FM Station
in DeWitt, Michigan
Channel 243A (96.5 MHz)

HEARING DESIGNATION ORDER

Adopted: August 17, 1988; Released: September 14, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter*. Each of the referenced applicants is short-spaced to the application filed by Walker-Kent Broadcasting Company (File No. BPH-851115MP) to serve Portage, Michigan on Channel 243A. Since Walker-Kent's application was filed before the June 29, 1987 release date of the allocation (*Report and Order* in MM Docket 86-74) of Channel 243A to DeWitt, it has been required to submit an amendment in the Portage proceeding specifying a transmitting antenna site fully-spaced to the DeWitt, Michigan allocation. *Larry Langford, Hearing Designation Order* in MM Docket No. 88-346, FCC Rcd (1988). Given this mandate, the applicants' request for waiver of 47 C.F.R. § 73.207 will be dismissed as moot.

3. *Group*. On September 10, 1987, Jack Bursack, President and 33 1/3 percent owner of Group, certified on pages 23 and 24 of Group's application that the statements "made in this application and attached exhibits are considered material representations, and that all exhibits are a material part hereof and incorporated herein," and that the statements are "true, complete and correct to the best of my knowledge and are made in good faith." However, a study of Group's application reveals that Section V-B, which contains the engineering data, was signed and dated September 12, 1987 by Fred Dale Howard, Group's consulting engineer. Mr. Howard certified his preparation of the engineering report on September 11, 1987. It is therefore clear that Mr. Bursack certified the application at a time when he could not have before him the certified engineering section or report data. As a result, the application appears to have been improperly certified by the applicant. Full exploration of this matter, including a determination of any impact this may have on Group's qualifications to be a broadcast licensee, is warranted. *See, Triangle Broadcasting Co.*, 49 RR 2d 1601, 1602 (ALJ 1981).

4. *Kuiper*. Mr. Kuiper is the Assistant Vice-President and Director of Furniture City Broadcasting Corporation, licensee of Radio Stations WFUR AM and FM in Grand Rapids, Michigan. He has indicated that, in the event of grant of the instant application, he will sever all employment connections with these stations prior to the commencement of program test authority. Accordingly, an appropriate condition will be specified.

5. *FMLP*. FMLP specified in its application that it is a limited partnership consisting of a general partner (Susan M. Alexander) and a limited partner (Great Lakes FM Partnership). Principals of the latter are involved in three other applications for new FM facilities. However, FMLP failed to provide an insulation statement wholly satisfying the requirements of the Commission's *Attribution Reconsideration* Order, 58 RR 2d 604, 618 (1985).[1] In order to determine its application's compliance with the Commission's attribution and cross-interest policies, FMLP will be required to file a clarifying amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

6. *Other matters*. Group (on April 28 and July 11, 1988) and Kuiper (on February 26, 1988) have petitioned for leave to amend their respective responses to Section II, Item 5(a) concerning broadcast applications each has or had pending before the Commission. In addition, the final five pages of Group's April 28th amendment contain statements from Jack W. Bursack and Fred Dale Howard concerning the certification discrepancy discussed in paragraph 3 hereinabove. The accompanying amendments were filed after November 23, 1987, the last date for filing minor amendments as of right. Under Section 1.65, applicants are responsible for amending their pending applications "whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects." The Bursack and Howard statements clearly do not fall within the scope of Section 1.65, and therefore they will be disallowed. Under Section 1.65, all other portions of Group's amendments and the entire Kuiper amendment are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

7. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine (a) the facts and circumstances surrounding the certification of Group's application by Mr. Jack Bursack and whether it was appropriately certified; and (b) in light of the evidence adduced under the foregoing issue, the impact upon Group's basic qualifications to be a broadcast licensee.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the applicants' requests for waiver of 47 C.F.R. § 73.207 regarding short-spacing to the application (File No. BPH-851115MP) filed by Walker-Kent Broadcasting Company to serve Portage, Michigan ARE DISMISSED AS MOOT.

11. IT IS FURTHER ORDERED, That, in the event of grant of his application, Kuiper must sever all connections with Radio Stations WFUR AM and FM, Grand Rapids, Michigan, prior to the commencement of program test authority.

12. IT IS FURTHER ORDERED, That FMLP shall submit to the presiding Administrative Law Judge a clarifying amendment to its application pursuant to paragraph 5 hereinabove, within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Group and Kuiper ARE GRANTED, that the accompanying amendments ARE ACCEPTED to the extent indicated herein, but that the statements of Messrs. Bursack and Howard contained in Group's April 28, 1988 amendment ARE DISALLOWED.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] In order for the limited partners to be exempt from attribution under the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, the applicant must certify that, by the terms of the partnership agreement, its limited partners will refrain from involvement in any material respect in the management or operation of the proposed station and, further, that no limited partner has any interest or connection of any nature with any broadcast station or other medium of mass communicatio operating within the service area of the proposed station that is or might be inconsistent with the Commission's cross-interest policy under the *Attribution Reconsideration* Order, 58 RR 2d 604, 618 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

Docket No. 88-424

In re Applications of

COUNTRY ROADS BROADCASTING CORPORATION (hereafter Country) BPH-870904MQ

TIM LAVENDER (hereafter Lavender) BPH-870910NT

For Construction permit
for a new FM station
on Channel 290A in
Whitley City, Kentucky

HEARING DESIGNATION ORDER

Adopted: August 17, 1988; Released: September 14, 1988

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *EEO*. In response to Section VI of FCC Form 301, Country indicated that they will employ five or more fulltime employees. Therefore, each is required to submit the five-point Model Equal Employment Opportunity (EEO) Program (FCC Form 396A). The guidelines to the Model EEO Program, paragraph IV, instruct the applicant to specify the sources that it proposes to use in recruiting minority and female applicants. Country has not provided specific female recruitment sources. Accordingly, Country will be required to amend its application within 30 days of the release of this Order, by submitting specific sources of female recruitment to the presiding Administrative Law Judge.

3. *Financial*. The material submitted by the applicant below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT	DEFICIENCY
Lavender	Applicant certifies that he is not financially qualified but will file certification as amendment to the application.

4. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and Country have been unsuccessful. Accordingly, since no determination has been received as to whether or not the antenna proposed by Country would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. *Country*. Applicant proposes to mount its antenna on one of the existing towers in the WEQO(AM) array. Our study indicates that the operation of the new proposal and the existing WEQO(AM) facilities may significantly exceed the radio frequency radiation guidelines under 47 C.F.R. Section 73.1307(b). Accordingly, the applicant is required to amend its application within 30 days of the date of this Order to demonstrate compliance with the RF radiation guidelines. The applicant must submit a detailed study based upon OST Bulletin No. 65, October 1985, entitled "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Radiation." This study must include the cumulative effect of the proposed operation and the WEQO(AM) operation. If a fence is to be built, the applicant must give the distance from the base of the tower to the fence. Since the proposal of the applicant may have significant environmental impact as defined by 47 C.F.R. Section 1.1307, the applicant is required to submit the environmental impact information described in 47 C.F.R. Section 1.1311. Accordingly, the applicant will be required to file an environmental assessment with the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. Section 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229, (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

6. Data submitted by the indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether comparative preference should accrue to any of the applicants.

7. Section II, item 4(a), FCC Form 301 (January 1982) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. Country has not completed item 4(a) correctly. The Country application gives a Post Office Box number as a residence address of Country. Accordingly, Country must submit an amendment which gives all the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Lavender, whether the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Country.

3. If a final environmental impact statement is issued with respect to Country, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1.1319 of the Commission's Rules.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That Country will file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Country shall submit the environmental assessment requred by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

13. IT IS FURTHER ORDERED, That Country shall submit an amendment which contains the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-326

In the Matter of

Access Tariff Filing Schedules

REPORT AND ORDER

Adopted: August 24, 1988; Released: September 14, 1988

By the Commission:

I. BACKGROUND

1. In the Notice of Proposed Rule Making (NPRM) in the proceeding captioned above, this Commission proposed revisions in our Rules governing access tariff filing schedules, in an effort to improve the filing process both in the short and long terms. The short-term improvement concerns the current schedule of separate access filings effective on December 1, 1988, January 1, 1989, April 1, 1989, and January 1, 1990. To reduce the burdens upon the local exchange carriers (LECs) of preparing these filings, upon this Commission of reviewing them, and upon the public of adjusting to such rapid rate changes, we proposed to delay the filings effective January 1, 1989 and consolidate them with the filings effective April 1, 1989. We also proposed a deferral of the January 1, 1990 effective date until July 1, 1990. The filings for December 1, 1988 would continue as scheduled.

2. The long term improvement was a shift from the present January 1 effective date for annual access tariffs to a July 1 date beginning in 1990. This Commission's experience has increasingly led us to the conclusion that January 1 is not the most practical effective date. First, a January 1 effective date precludes use of the actual calendar year data generally maintained by the LECs; a July 1 - June 30 period currently must be used to obtain the most current available data. We observed that "It would appear more convenient for the LECs to use a calendar year historical baseline period and a July 1 - June 30 period for their projected data than the reverse, as is currently required." In addition, the present October through December review period has the practical effect of reducing the time actually available to this Commission and increasing the burdens of effectively reviewing the massive LEC filings. The overlap of this period with the traditional end-of-the-year holiday season has similar effects on the LECs and members of the public who wish to file comments.

3. Twelve comments or replies were filed by LECs, who would be most directly affected by the proposed rule changes[1] and five by LEC customers and groups representing customers.[2] All of the commenters supported the proposed consolidation of the upcoming filing dates (with one possible exception), [3] while in some cases presenting related proposals. All but two of the commenters who addressed the issue supported the move to a midyear effective date. Based upon this record and our own experience, we conclude that the revised rules will better serve the public interest and carry out the purpose of the Communication Act, with certain clarifications and minor conforming revisions. As modified, the proposed rules are therefore adopted.

II. DISCUSSION

A. Consolidation of the Filing Schedule

4. The commenters who address the issue agree unanimously that the proposed consolidation of the access filing schedule will benefit the public and all other parties. Among LECs Ameritech states, for example, at page 4 of its Comments:

> The suggested revisions to the access tariff filing dates offer clear improvements over the current schedules for all concerned. The changes lessen the plethora of filings required of carriers over the next year, reducing the burden on the carriers, the Commission and interested parties. Equally beneficial is the reduction in the number of rate changes to which customers must adjust. Moreover, by postponing the October 3 filing, more actual data can be used to forecast demand quantities, increasing the accuracy of demand assumptions.

5. These comments were echoed by COMPTEL, a trade association of interexchange carriers (IXCs): "COMPTEL and its members are specifically concerned about the ramifications of the rate churn which will result under the current schedule of access tariff changes . . . Such frequent changes in their costs cause significant upheaval in the business operations of the IXCs which inevitably affects their end-user customers and their relationships with those customers. Thus COMPTEL supports the proposal of the Commission . . . " COMPTEL Comments at 1-2. Other comments similarly support the proposed schedule.

6. The comments do raise a few issues not directly raised in the NPRM. Some commenters (NECA, Pacific, Nynex, US West) propose that the baseline past year cost of service study submitted as part of the access tariff cost support material be limited to a six or nine month period of 1988, to avoid the inclusion of data which would not reflect the substantial changes in the accounting, separations, and access rules which became effective on January 1, 1988. Some commenters (NECA, Ameritech, Nynex, Pacific, SW Bell, US West) propose that calendar year 1989 be used as the test year upon which rate calculations would be based, despite the change to an April 1, 1989 through June 30, 1990 rate period. They explain that the LECs have already been working to develop prospective calendar year 1989 budget views and this work can be put to use if a calendar year 1989 test year is selected, but assert that this work would be largely unusable in preparing for an alternative test year. A test period which extended into 1990 would, it is claimed, require development of a new budget, increasing the burdens on the LECs and possibly yielding less reliable data and a more complex, less easily understood filing.

7. AT&T states in its Reply that it does not object to use of 1989 as the test period so long as separations and accounting changes, scheduled to reduce interstate access

costs on January 1, 1990, are appropriately reflected in access rates. AT&T suggests that rate adjustment factors to take effect January 1, 1990 be required as part of the LEC filings, based upon appropriate support documentation.

8. Issues involving the details of the annual access tariff filings, including the historical and test years and waivers for individual LECs, frequently present complex and interrelated considerations which we have in the past allowed the Common Carrier Bureau to resolve based upon consultation with affected parties and the specific circumstances. They are among the issues on which submissions have been invited in a Bureau Public Notice, DA 88-1257, released Aug. 10, 1988. We will leave resolution of these issues to the Bureau based upon its consideration of those submissions and other relevant considerations. Its resolution of these issues should give priority to assuring that the methodology used results in just and reasonable rates for the entire period from January 1, 1989 through June 30, 1990, based upon adequate supporting information.

9. Specifically, we agree with AT&T that scheduled changes in separations rules which can be expected to reduce access charges must be appropriately reflected in the access rates, whatever methods or periods are used. The changes in periods should not exert any bias on the rates which would otherwise result. We do not believe that the approach proposed by AT&T of adjustment factors to reflect the separations changes at the time they occur, in the middle of the annual period, is necessarily the best method. We note for example that this would imply simultaneous changes in end user rates at that time. The priority is to assure that rates are reasonable during the period in which they are filed to be in effect, as required by the Part 69 Rules. The most practical method of achieving this goal can best be evaluated by the Common Carrier Bureau.

10. Similarly, we reiterate that extension of the current rates until April 1, 1989 does not alter the statutory obligation of carriers to maintain just and reasonable rates. We expect both AT&T and the LECs to make such adjustments as may be necessary to ensure that their rates are just and reasonable, and thus are designed to produce returns at their authorized levels during the 15 month period from January 1, 1988 through March 31, 1989. As we proposed in the NPRM, we direct the Common Carrier Bureau to make any necessary adjustments should carriers fail to initiate such adjustments themselves. *See* NPRM at 7, fn. 7.

11. NECA also seeks clarification that the effective date for changing participation in NECA's Traffic Sensitive (TS) pool is also extended from the current January 1, 1989 date to coincide with the April 1, 1989 tariff effective date. As NECA points out, any change in the TS pool composition at a time other than the annual access filing date would require NECA and any LEC entering or exiting the pool to make separate tariff filings. As NECA suggests, our intent has always been to avoid these difficulties by coordinating pool changes with the annual filings; that remains the case here. We therefore grant the requested clarification.

B. The Mid-Year Filing Schedule

12. The commenters agree almost as unanimously that permanent adoption of a July 1 effective date beginning in 1990 would reduce the end-of-the-year burdens that the current filing schedule presents for all concerned. BellSouth agrees, for example, that the current January 1 effective date imposes greater burdens on the LECs and concludes that "The proposed rule changes provide a practical solution to the current situation." BellSouth Comments at 4. SNET states that use of the July 1 effective date should "improve the overall logistics and timing of the complex access filing and review process. The adoption of the Commission's proposal will reduce the burden of all stakeholders, reduce the cost of regulation, while retaining the transition to the more economic recovery of interstate costs." SNET Comments at 3-4.

13. Commenters generally concur as well that shifting to a July 1 effective date will allow use of historical data on a calendar year basis, which is more conveninent because the LECs now generally collect and report it for calendar years. Nynex asserts, for example, that this shift "should improve usefulness of the [historical] period data underlying the LECs' access tariff filings." Nynex Comments at 3.

14. USTS describes additional benefits which the mid-year filing schedule would provide to IXCs and their customers. USTS explains that the task of reviewing and analyzing the annual access tariff filings for its own business planning as an IXC has been handicapped by the timing of these access tariff changes, which are typically finally determined during the week between Christmas and New Year's Day. "With holiday planning, scheduled vacations, and other absences or diversions associated with the holidays for the company's personnel, it is simply not possible to devote the resources to that tariff review process, and development of the company's response thereto, that would be desirable and possible given a mid-year tariff effective date." USTS Comments at 2. COMPTEL expresses the same view, arguing that the current end-of-the-year schedule impedes the ability of IXCs to address the filings adequately and make responsive tariff and pricing changes. COMPTEL Comments at 2.

15. Pacific and Contel are the only commenters that present significant objections to permanent adoption of a July 1 effective date.[4] Pacific states that a permanent move to a July 1 effective date would be acceptable if the price cap plan currently under consideration by the Commission is adopted, because the tariff filing in that case would rely on the previous calendar year's historical data. Under rate of return regulation, however, a mid-year filing is said to be "problematic" because the Pacific Companies develop their budget information on an annual basis, and "[d]etailed budget information for the second six months of the tariff period would not have been developed as of the filing date." Pacific Comments at 6. Pacific states, without further explanation, that "tremendous resources [would be] necessary to rework the budget process in order to accomodate a mid-year filing." *Id. at 7.*

16. Contel states that "it is critical to Contel's ability to project just and reasonable rates to be able to do so on the basis of the detailed budget of the up-coming calendar year." Contel Comments at 5. Use of less precise projections for a subsequent year could, it is said, result in numerous mid-course corrections. Contel also suggests that the mid-year schedule would not avoid holiday problems, because "conflicts with Easter, Passover, and Memo-

rial Day holidays and end of school summer vacations would be substituted for the conflicts attendant to the end of the year holidays." *Id.* at 6. Contel proposes that a better way to resolve the long-term tariff filing problem is to eliminate required annual filings or, to shift to biennial filings, or to allow LECs the option of filing either on a calendar year or mid-year basis. In its Reply it states that a midyear filing schedule would require "costly changes in its budgeting, forecasting, and systems processes" but does not attempt to further describe or quantify those costs.

17. We recognize that any change in procedures is likely to imply some increased costs by the affected regulated carriers in the short run. However, in this case most LECs agree that the use of a July effective date will provide definite benefits and in various ways reduce costs and burdens for the LECs. Moreover, they don't believe that the increased burdens of the transition to this date outweigh the clear long term benefits. In contrast to Pacific and Contel, for example, BellSouth states that "its planning processes could readily be adapted to accomodate a midyear schedule." BellSouth Comments at 4. There are no apparent differences that would make this task more difficult for other LECs. We thus find unpersuasive Pacific and Contel's unsupported and undocumented need to devote "tremendous resources" or undertake "costly changes" to accomodate mid-year filings. We note in this regard that the LECs had experience with a mid-year annual filing in 1985 and that they frequently submit voluntary mid-year filings. Thus, if the burdens were in fact "tremendous" Pacific and Contel should be able to document that fact, in order that the costs might be weighed against other benefits,[5] especially the benefits to LEC customers, whose comments on the issue all support the change.

18. Contel's more radical suggestions involve requests for substantial changes in the nature of access filings as they were developed in earlier Rule Makings, and substantial conforming changes in other rules and procedures. Whatever the merits of such changes (and Contel does no more than briefly mention these suggestions) they are beyond the scope of the present proceding and of the issues for which comment was sought.[6] Annual access tariff filings were adopted to assure that rates would be reasonable, would reflect ongoing rules changes, and would become more closely aligned with costs. Contel does not address these reasons for adopting annual filings in arguing that their abandonment or substantial modification would reduce filing burdens. This Rule Making was addressed to reducing filing burdens and otherwise improving the current annual filing process without reopening the many issues which would be presented by proposals to change the basic structure of the access tariff program or of the access tariff review process. Contel presents no substantial grounds for such an expansion of the scope of this proceeding and we decline to do so.

19. Overall, it appears from the LEC comments that the shift to a July 1 effective date will on balance be of benefit to the LECs themselves. When the additional benefits to this Commission and to the public are added in, the net benefit of the shift is apparent.

C. The LS-1 Transition Rates

20. NECA and US West point out that the Local Switching 1 (LS1) transitional adjustment factors contained in Section 69.205(e) of the Rules, 47 C.F.R. § 69.205(e) are based on calendar year periods. Use of these same factors with a mid-year filing schedule would alter the transition unless the LECs also made tariff filings to be effective each January 1 or included different factors for the first and second halves of the period in which the rates would be in effect. This would require corresponding changes in the support material and rate calculations. US West suggests revised LS1 transitional charges intended to reflect a mid-year filing schedule without changing the level of the transition.

21. We agree that it is desirable to adapt the current LS1 transition factors to the July 1 effective date in a manner which both leaves the transition factors essentially unchanged and avoids the need for additional filings. The factors computed by US West do not accomplish this purpose quite accurately. For example, they do not implement the next step of the transition effective January 1, 1989 as the current rules provide and they extend the transition period for an additional six months. We have computed correct replacement factors as described in Appendix A. Section 69.205(e) of the Rules is amended to incorporate these factors.

D. Rates of Return

22. ICA-CFA's comments do not address the schedule issues raised in the Notice, but take the occasion to submit a study which they state was prepared for submission in this Commission's price cap proceeding, Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313. The study concerns the present authorized rate of returns for the LECs, and the accompanying comments argue that the current authorized rate of return should be re-evaluated and reduced before the next access tariff are filed. MCI concurs with these comments in its reply.

23. The question of the currently appropriate rates of return was addressed earlier this year in *Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers*, CC Docket No. 87-463, 3 FCC Rcd 1697 (1988). Based upon the record developed in that proceeding, notably the fact that no commenter believed that the current authorized rates of return are unreasonable under current market conditions, the Commission extended the current authorized rates of return until the end of calendar year 1989. Reopening and reconsidering that decision in the context of the present proceeding would be procedurally inapposite (*see* Section 1.429(d) of this Commission's Rules, 47 C.F.R. § 1.429(d)) and is in any case impracticable. Even at the time of that Order, we concluded that it would not be possible to complete a represcription hearing that could be reflected in tariff rates in January 1989. *Id.* at 1698. There is even less time available now. Moreover, even if we determine in a subsequent proceeding that the authorized rate of return should be represcribed, this could be accomplished midway through an annual access tariff period. While it is desirable and convenient to coordinate the two events, it is by no means necessary. For purposes of the annual 1989 access tariff filings, LECs will be subject to the rate of return authorized in CC Docket No. 87-463.

E. NECA Average Schedule Filing Dates

24. Under current Rules, NECA is required to file updates to its average schedule formula, or certify that no change is required, no later than June 30 each year, six months before the current January 1 effective date of the annual access tariffs. Section 69.606(b) of this Commis-

sion's Rules, 47 C.F.R. § 69.606(b). In the NPRM, we proposed to conform this section of the Rules by requiring NECA to submit this filing on December 31 of the preceding year, six months before the proposed July 1 effective date. NECA proposes, rather than simply conforming this filing date to the new effective date, that the date be changed to coincide with the date of the annual access tariff filings, *i.e.*, to 90 days prior to the tariff effective date. NECA urges that this change would allow it to use more current actual data for the development of average schedule formulae and ensure consistency with the forecasts used in the annual filing. None of the replies addressed this proposal.

25. While a later filing date for these revisions would presumably allow more current data and forecasts, as NECA suggests, it would also limit the time available for this Commission to review the schedules. In place of the six month period allowed by the current Rule, NECA's proposal would limit review to the ninety day review period during which the Commission is also reviewing all the annual access tariff filings. Especially in view of the fact that we have found it necessary to correct the schedules as filed in the past[7] we do not believe that shortening this review period is warranted by the possible availability of somewhat more recent data. The fact that the data might be somewhat more consistent with the data used in the annual filing also does not seem of sufficient moment to warrant limiting the ability of this Commission and the interested public to comment on, review and, if necessary, correct the filings. We accordingly deny this proposal and adopt the rule as proposed.

F. Small Telephone Companies

26. TUECA, which represents a group of twelve small telephone companies, supports the proposed rule changes but asserts that small telephone companies that file their own access tariffs may face special problems that hinder their ability to estimate test period revenue requirement and demand. It suggests that consideration be given to small companies who may not be able to provide data in the same detail or timeliness as larger LECs.

27. In developing cost support and other filing requirements for the annual access tariffs, this Commission has always sought to recognize the special circumstances of small companies, and to develop approaches adequate to assuring just and reasonable rates with a minimum of administrative burdens. *See e. g.*, Sections 61.39 and 69.3(f) of this Commission's Rules, 47 C.F.R. § 61.39 and 69.3(f). In considering the specific requirements of future access tariff filings, including data requirements and waivers in particular cases, we will continue to take account of the special circumstances of small telephone companies.

III. PROCEDURAL MATTERS

28. We certify that the Regulatory Flexibility Act[8] is not applicable to the rule changes we are adopting in this proceeding. As part of our analysis of the Rules adopted in this Order, however, this Commission has considered the impact of the proposal on small telephone compnaies, *i.e.*, those serving 50,000 or fewer access lines.[9] The Rules adopted herein will have a beneficial economic impact on all such telephone companies because it reduces the number of required access filings made by or on behalf of those companies, and thereby reduces their administrative costs.

29. The rules adopted in this Notice have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure, or record retention requirements as contemplated under the statute. The Rules will not increase the collection of information burdens imposed on the public.

IV. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED that the amendments to Part 69 contained herein are adopted effective **September 1, 1988.** This action is taken pursuant to Sections 4, 201-203, and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154, 201-203, 403, and 5 U.S.C. § 553.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

Under the current Rules, the rate differential between Local Switching 1 (LS1, which applies to access arrangements other than that provided for MTS and WATS services) and the alternative Local Switching 2 (LS2) are to be phased out over a five year period ending in 1992. *See* Section 69.205 of this Commission's Rules, 47 C.F.R. § 69.205. The transition factors are:

1988 - .78
1989 - .83
1990 - .88
1991 - .93
1992 - .98

NECA suggests that under a midyear filing schedule, adjusted transitional charges should be calculated beginning in 1990 to reflect application of one discount level from July 1 to December 31, and a different level from January 1 until the new tariffs become effective the next July 1. It believes that no change is needed in the current factor if a calendar year 1989 test period is used for the filing to become effective April 1, 1989.

US West proposes that revised factors be calculated to correspond to the midyear schedule, by a simple weighting of the present factors to reflect the number of months each would be in effect for the planned midyear filing periods through 1992. *See* US West Comments at 7.

AT&T and MCI both agree in their reply comments that the LS-1/LS-2 transition should be adapted to the midyear filing schedule, but suggest no specific methods.

We believe that the approach suggested by US West is a useful and reasonable one, because it results in a simple factor which each LEC may apply and maintains the transition with a minimum of change in the program as adopted. It appears to be the most convenient method of conforming the transition to a midyear schedule. However, the factors as calculated by US West appear inaccurate in

two instances. In calculating the factor for the period April 1 1989 to June 30, 1990, US West overlooks the fact that delaying the effective date of the annual tariffs from January 1, 1989 to April 1, 1989, has the effect of continuing the existing 1988 factor for three months. US West also uses a schedule which would extend the final transition factor until June 30, 1993, rather than until December 31, 1992 as the current Rules provide.

We do not believe it is necessary or desirable to extend the transition in this manner, especially since the transition is planned to correspond with the phase-in of underlying jurisdictional cost allocators. *See* Section 36.125 (c) - (e) of this Commission's Rules, 47 C.F.R. § 36.125 (c) - (e). While use of a factor which applies only for half of the expected tariff effective period will require some adjustments in underlying rate calculations in the annual filing effective July 1, 1992, this should not be an overly complex task, and any error in this last year of the transition should have only a slight effect in view of the very small discount.

We have recalculated US West's transition factors to reflect the delay in application of the 1989 factor until April 1, 1989 and to maintain the current termination date of December 31, 1992. This calculation produces the following set of factors:

April 1, 1989 to June 30, 1990 tariff

To calculate a revised factor for this period which corresponds so far as possible to the scheduled factors, it is necessary to adjust for the fact that the 1988 factor of .78 will continue in effect for three months during the relevant 18 month period from January 1, 1989 to July 1, 1990. For the fifteen month period during which the revised factor would apply, we would replace the 1989 factor of .83 for 9 months and the 1990 factor of .88 for 6 months. If we represent the revised factor by RF, this produces the following calculation:

$(3/18 \times .78) + (15/18 \times RF) = (12/18 \times .83) + (6/18 \times .88)$ or

$(3 \times .78) + (15 \times RF) = (12 \times .83) + (6 \times .88)$ or

$15 \times RF = 9.96 + 5.28 - 2.34$ or

$15 \times RF = 12.9$ or

$RF = .86$

July 1, 1990 to June 30, 1991 tariff

$(6/12 \times .88) + (6/12 \times .93) = .905$

July 1, 1991 to June 30, 1992

$(6/12 \times .93) + (6/12 \times .98) = .955$

July 1, 1992 to June 30, 1993 tariff

July 1, 1992 through December 31, 1992 - .98

January 1, 1993 through June 30, 1993 - 1.0

We have revised Section 69.205(e) of our Rules, 47 C.F.R. § 69.205(e), as shown in Appendix B of this Order to reflect these calculations.

APPENDIX B

Part 69 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 69 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 104, 201, 202, 203, 205, 218, 403.

2. 47 CFR 69.2 is amended by revising paragraphs (v) and (w) to read as follows:

§ 69.2 Definitions

* * * * *

(v) Level II Contributors - A telephone company or group of affiliated telephone companies with fewer than 300,000 access lines and less than 150 million in annual operating revenues that is not an association Common Line tariff participant, that files its own Common Line tariff effective July 1, 1990, and that had a lower than average Common Line revenue requirement per minute of use in 1988 and thus was a net contributor (i.e., had a negative net balance) to the association Common Line pool in 1988.

(w) Level II Receivers - A telephone company or group of affiliated telephone companies with fewer than 300,000 access lines and less than 150 million in annual operating revenues that is not an association Common Line tariff participant, that files its own Common Line tariff effective July 1, 1990, and that had a higher than average Common Line revenue requirement per minute of use in 1988 and thus was a net receiver (i.e., had a positive net balance) from the association Common Line pool in 1988.

* * * * *

3. 47 CFR 69.3 is amended by revising paragraphs (a), (b), (e)(6), (e)(9) and (f) to read as follows:

Section 69.3 Filing of access service tariffs

(a) Except as provided in § 69.3(f) of this chapter, a tariff for access service shall be filed with this Commission for an annual period. Such tariffs shall be filed so as to provide a minimum of 90 days notice with a scheduled effective date of July 1. Such tariff filings shall be limited to rate level changes.

(b) The requirements imposed by paragraph (a) of this section shall not preclude the filing of revisions to those annual tariffs that will become effective on dates other than July 1.

* * * * *

(e) * * *

(6) A telephone company or companies that elect to file such a tariff shall notify the association not later than December 31 of the preceding year, if such company or companies did not file such a tariff in the preceding annual period or cross-reference association charges in such preceding period that will not be cross-referenced in the new tariff.

* * * * *

(9) A telephone company or group of affiliated telephone companies that elects to file its own Carrier Common Line tariff effective April 1, 1989 shall notify the association not later than August 30 of the preceding year that it will no longer participate in the association tariff. telephone company or group of affiliated telephone companies that elects to file itw own Carrier Common Line tariff effective July 1, 1990 or thereafter pursuant to § 69.3(a) shall notify the association not later than December 31 of the preceding year that it will no longer participate in the association tariff. A telephone company or group of affiliated telephone companies that elects to file its own Carrier Common Line tariff for one its study areas shall file its own Carrier Common Line tariffs for all of its study areas.

(f) A tariff for access services shall be filed with this Commission for an annual period. Such tariffs shall be filed so as to provide a minimum of 90 days notice with a scheduled effective date of July 1. A tariff for access service provided by telephone companies with 50,000 lines or fewer in a study area, as determined under § 67.611 of this chapter, may be filed for a biennial period, with a minimum of 90 days notice, to begin on July 1 of any odd-numbered year. For purposes of computing end user charge access elements and carrier's carrier charges other than for the Carrier Common Line element to be effective on July 1 of any even-numbered year, the association may propose rate changes based upon statistical methods which represent a reasonable equivalent to the cost support information otherwise required under Part 61 of this chapter.

* * * * *

4. 47 CFR 69.201 is revised to read as follows:

69.201 General

Notwithstanding §§ 69.4, 69.104 through 69.106, and 69.111 through 69.112, charges for the access elements described in this Subpart shall be computed in accordance with this Subpart during the period commencing January 1, 1984 and ending June 30, 1990. This Subpart does not supersede § 69.106(c) through (e).

5. 47 CFR 69.205 is amended by revising paragraph (e) to read:

§ 69.205 Transitional premium charges.

* * * * *

(e) During each of the following years the LS1 transition factor shall be:

(1) January 1, 1988 through March 31, 1989 - .78

(2) April 1, 1989 through June 30, 1990 - .86

(3) July 1, 1990 through June 30, 1991 - .905

(4) July 1, 1990 through June 30, 1992 - .955

(5) July 1, 1992 through December 31, 1992 - .98

* * *

6. 47 CFR 69.209 is added to read as follows:

§ 69.209 Annual 1989 access tariff filings

Notwithstanding § 69.3, tariffs for access service shall be filed to be effective April 1, 1989 for a period extending through June 30, 1990. Such tariffs shall be filed so as to provide a minimum of 90 days notice.

7. 47 CFR 69.606 is amended by revising paragraph (b) to read as follows:

§ 69.606 Computation of average schedule company payments.

* * * * *

(b) The association shall submit a proposed revision of the formula for each annual period subsequent to December 31, 1986 or certify that a majority of the directors of the association believe that no revisions are warranted for such period on or before December 31 of the preceding year.

* * *

8. 47 CFR 69.612 is revised to read as follows (elided text is unchanged):

§ 69.612 Long term and transitional support

A telephone company that does not participate in the association Common Line tariff shall have computed by the association:

(a) Long Term Support Obligation . . .

(1) For the period from April 1, 1989 through June 30, 1994, the Long Term Support payment obligation shall be funded by all telephone companies that are not association Common Line tariff participants and do not receive transitional support pursuant to § 69.612(b) . . .

(2) Beginning July 1, 1994 and thereafter, the Long Term Support payment obligation shall be funded by each telephone company that files its own Carrier Common Line tariff and does not receive transitional support . . .

(b) Transitional Support. (1) Telephone Companies categorized as Level I and Level II Receivers that file their own Common Line tariffs effective April 1, 1989 shall receive Transitional Support for a four year period commencing April 1, 1989. Level II Receivers that file their own Common Line tariffs effective July 1, 1990 shall receive Transitional Support for a four year period commencing July 1, 1990. Transitional Support for each of these telephone companies shall be computed on the basis of the net revenues less revenue requirement amounts for 1988 (adjusted for the additional revenues resulting from an increase in End User Common Line charges to 3.50). Transitional Support for these telephone companies during the transition shall be as follows:

Year 1 - 80% of the adjusted 1988 frozen amount

Year 2 - 60% of the adjusted 1988 frozen amoung

Year 3 - 40% of the adjusted 1988 frozen amoung

Year 4 - 20% of the adjusted 1988 frozen amoung

(2) For the period from April 1, 1989 through June 30, 1994, the Transitional Support Fund shall be funded by all telephone companies or groups of affiliated telephone companies that are not association Common Line tariff participants and do not qualify under § 69.61)(1) for Transitional Support payments . . .

FOOTNOTES

[1] Comments were filed by: the National Exchange Carrier Association (NECA); the Ameritech Operating Companies (Ameritech); the BellSouth Telephone Companies (BellSouth); Contel Corporation (Contel); Cincinnati Bell Telephone (CBT); the NYNEX Telephone Companies (Nynex); Pacific Bell and Nevada Bell (Pacific); the Southern New England Telephone Company (SNET); Southwestern Bell Telephone Company (SW Bell), the Telephone Utilities Exchange Carrier Association (TUECA); United Telecommunications,Inc. (United); and the US West telephone companies (US West). Replies were filed by: Contel, BellSouth, Pacific, and US West.

[2] Comments were filed by the Competitive Telecommunications Association (COMPTEL); the International Communications Association and the Consumer Federation of America (ICA-CFA); MCI Telecommunications Corporation (MCI); and United States Transmission Systems, Inc. (USTS). Reply comments were filed by MCI and American Telephone and Telegraph Company (AT&T).

[3] As we discuss *infra* the ICA-CFA comments do not address the issues set out in the Notice. They do not appear to express any view concerning those issues.

[4] SW Bell supports the shift to a July 1 effective date but also urges use of a calendar year test period. It states that a split-year test period, *i.e.*, a test year corresponding to the period in which the rates would be in effect, would require development of detailed monthly budget projections beyond the calendar projections used in the annual access tariff filings. It notes that other external factors and rules also are performed on a calendar year basis.

As discussed, *supra*, we believe issues of the appropriate historical and test years, as well as other details which must be resolved in planning for the annual access filings, are best dealt with at the staff level by the Common Carrier Bureau.

[5] Contel's separate comment that some holidays would conflict with the midyear filing period is also less than compelling. As virtually all commenters recognize, the midyear filing schedule lessens the burdens and inconveniences for all concerned even if it does not eliminate them. Improvements need not be panaceas to be worthwhile.

[6] Moreover, the proposal to move to biennial filings for large LECs (biennnial filings have already been adopted for small LECs, Section 69.3(f) of this Commission's Rules, 47 C.F.R. § 69.3(f)) would still present the same burdens in the years the filings were made. A midyear filing schedule would provide the same benefits for each filing regardless of the frequency. It also is worthy of note that many LECs, including Contel, claim that they lack confidence in their ability to project accurately beyond the one year horizon of their current corporate budgets. A biennial filing would present greater demands in this regard.

The suggestion of separate annual and midyear filings at the LEC's election would similarly retain calendar-year filing burdens associated with LECs who chose calendar-year filings, and impose major new burdens on long distance carriers and this Commission to prepare for and review access tariffs, and develop corresponding long distance rates, twice a year. Ordinary customers could also expect greater rate churn as long distance rates would presumably require adjustment twice a year. The limited benefits of increased "flexibility" appear clearly outweighed by these added inconveniences and costs.

[7] NECA's Proposed Revisions to the Average Schedules for 1988, 3 FCC Rcd 172 (1988).

[8] 5 U.S.C. § 601 *et seq.* (1987).

[9] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY Revisions to Tariff F.C.C. No. 68	Transmittal Nos. 1685 and 1688
AMERITECH SERVICES Revisions to Tariff F.C.C. No. 2	Transmittal No. 204
BELLSOUTH TELEPHONE COMPANIES Revisions to Tariff F.C.C. No. 1	Transmittal No. 173

ORDER

Adopted: September 2, 1988; Released: September 2, 1988

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, various local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[1] The revisions are scheduled to become effective on dates ranging from September 6, 1988, to September 26, 1988.[2]

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings, and establishing a pleading cycle. [3] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 1685 and 1688, Ameritech Services, Tariff F.C.C. No. 2, Transmittal No. 204, and BellSouth Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 173, are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 88-405.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R, § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] We note that while the LECs' filings also propose ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[2] No petitions have been filed to reject, suspend, or investigate any of these transmittals.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-467

In the Matter of

Amendment of Part 97 of the
Commission's Rules to permit use
of the 17 meter band by the
Amateur Radio Services.

NOTICE OF PROPOSED RULE MAKING

Adopted: September 1, 1988; Released: September 14, 1988

By the Commission:

I. BACKGROUND

1. The Final Acts of the 1979 World Administrative Radio Conference (1979 WARC), which comprise an international treaty, allocated the 17 meter band to the Amateur and Amateur-Satellite Radio Services.[1] While we have allocated this band for amateur services operation in the United States, it remains an alternative allocation to the Government fixed service until such services are removed from the band. *See Second Report and Order*, General Docket No. 80-739, 54 RR 2d 1500 (1983). *See also* Footnote US 248 to the Table of Frequency Allocations, 47 C.F.R. § 2.106.

2. The United States Department of Commerce, National Telecommunications and Information Administration (NTIA), acting upon advice from the Interdepartment Radio Advisory Committee (IRAC), has informed us that United States Government fixed operations in the 17 meter band will preclude any amateur service usage of this band before July 1, 1989. Thus, we have denied access to the 17 meter band to amateur stations until July 1, 1989. *See Notice of Proposed Rule Making*, PR Docket No. 84-960, 49 Fed. Reg. 40611, 40612 (1984). *See also* Letter from the Chief Engineer to the American Radio Relay League, Inc. (ARRL) (February 9, 1987).

3. Normally, a two-step process follows domestically after allocation of a frequency band internationally. We have taken the first step, which is to amend Part 2 of the Commission's Rules, 47 C.F.R. Part 2, including the domestic Table of Allocations, to add 17 meters as an amateur services allocation. *Second Report and Order*, General Docket No. 80-739, *supra*. To make this spectrum available to amateur stations by July 1, 1989, we must now take the second step, which is to adopt rules in the amateur services for use of the spectrum.

II. PROPOSAL

4. We propose to permit amateur station operation in the entire 17 meter band. Additionally, we propose to create a 42 kHz telegraphy/digital emissions subband (18.068-18.110 MHz) similar to those in the other high frequency amateur service bands. This proposal is consistent with the previous petition for rule making filed with respect to the 17 meter band by ARRL on July 2, 1986. Although that petition was dismissed at the time because it was premature, the recommendations for use of the band in the amateur services are still valid. *See* Letter from the Chief Engineer to the American Radio Relay League, Inc., *supra*.

5. Additionally, the International Amateur Radio Union regional organizations have each adopted resolutions recommending a telegraphy/digital emissions subband in the 17 meter band.[2] The subband we propose is consistent with these recommendations. Implementation of such a subband would assure consistency and international harmony in the use of the 17 meter band. In the balance of the band we propose to authorize telephony, facsimile and television emissions.

6. We propose to make the 17 meter band available to General, Advanced and Amateur Extra Class operator licensees. This approach is consistent with our previous authorization of the 12 meter band (24.890-24.990 MHz) to the amateur service. *See First Report and Order*, PR Docket No. 84-960, 50 Fed. Reg. 18662 (1985). We are preliminarily of the view that use of the 17 meter band requires the skill and knowledge of General operators and above. More than fifty nations already authorize use in this band, and we propose to make the entire band available in the Amateur-Satellite Service. Moreover, we propose no power limitations in the band other than those which generally govern the amateur services. *See* 47 C.F.R. § 97.67(a) and (b). To minimize the potential for interference in this band, we therefore believe the minimum skills associated with the General Class operator license are required. We seek comment on the operator classes that should have access to this band.

7. Accordingly, we propose to amend Part 97 of the Commission's Rules, 47 C.F.R. Part 97, to add the 17 meter band to the amateur services as described above. The rules proposed are set forth in the attached Appendix.

III. PROCEDURAL MATTERS

8. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time that commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

9. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be

present. 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. § 1.1206.

10. Authority for issuance of this *Notice* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **October 31, 1988** and reply comments on or before **November 30, 1988.** The Commission will consider all relevant and timely comments before taking final action in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

11. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, the Commission certifies that these rules would not, if promulgated, have a significant economic impact on a substantial number of small entities, because these entities may not use the amateur radio services for commercial radiocommunication. *See* 47 C.F.R. § 97.3(b). Moreover, the proposed rules would not require the use of or significantly enhance the sale of any additional amateur radio services apparatus.

12. This proposal has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

13. IT IS ORDERED that the Secretary shall cause a copy of this *Notice* to be served upon the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

Part 97 of Chapter 1 of Title 47 of the *Code of Federal Regulations* is proposed to be amended, as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, unless otherwise noted.

2. Section 97.7(c) would be amended by adding the following line entry in the table between the last 20 meter band entry and the first 15 meter band entry, as follows:

Section 97.7 Frequency privileges.

(c) * * *

Terrestrial location of the amateur radio station				
Meter Band	ITU Region 1	ITU Region 2	ITU Region 3	Limitations (see para). (g))
		kilohertz		
		* * * * *		
17	18068-18168	18068-18168	18068-18168	
		* * * * *		

3. Section 97.7(d) would be amended by adding the following line entry in the table between the last 20 meter band entry and the first 15 meter band entry, as follows:

(d) * * *

Terrestrial location of the amateur radio station				
Meter Band	ITU Region 1	ITU Region 2	ITU Region 3	Limitations (see para). (g))
		kilohertz		
		* * * * *		
17	18068-18168	18068-18168	18068-18168	

* * * * *

4. Section 97.7(e) would be amended by adding the following line entry in the table between the 20 meter band entry and the 15 meter band entry, as follows:

(e) * * *

Meter Band	Terrestrial location of the amateur radio station: ITU Region 1	ITU Region 2	ITU Region 3	Limitations (see para). (g))
	kilohertz			
* * * * *				
17	18068-18168	18068-18168	18068-18168	
* * * * *				

5. Section 97.61(a) would be amended by adding two line entries to the table between the 7150-7300 kHz and 10100-10150 kHz entries, as follows:

Section 97.61 Authorized emissions.

(a) * * *

Frequency band (kHz)	Emissions	Limitations (see paragraph (d))
* * * * *		
18068-18110	A1A, F1B	
18110-18168	A1A, A3E, F3E, G3E, A3C, F3C, A3F, F3F	
* * * * *		

6. Section 97.415(a) would be amended by adding one line entry between the 14000-14250 and 21000-21450 entries in the k iloh ertz portion of the table, as follows:

Section 97.415 Frequencies available.

(a) * * *

Frequency band kilohertz	Limitations (see paragraph (b))
* * * * *	
18068-18168	
* * * * *	

FOOTNOTES

[1] The Final Acts of the 1979 WARC became effective internationally on January 1, 1982, for administrations that ratified the treaty prior to that date and will become effective for other nations upon deposit with the International Telecommunication Union (ITU) of their instrumentof ratification. The United States Senate gave its advice and consent to ratify the treaty in December, 1982, and submitted it to the President who signed it on September 6, 1983. The treaty now has the force of law in the United States. The frequencies between 18.068 MHz and 18.168 MHz are commonly referred to in the amateur communityas the 17 meter band.

[2] *See* the IARU *Calendar*, 128, issued April 15, 1985.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GROUP W CABLE INC.,
WESTINGHOUSE
BROADCASTING AND
CABLE, INC.,
Complainants,

v. File No. PA-83-0023

GEORGIA POWER
COMPANY
Respondent.

ORDER

Adopted: September 2, 1988; Released: September 14, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1983, Group W Cable, Inc. and Westinghouse Broadcasting and Cable, Inc. filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that Georgia Power Company had imposed unjust and unreasonable rates for cable television pole attachments. The Commission ruled in favor of the complainants,[1] but subsequently, the United States Court of Appeals for the District of Columbia vacated and remanded the Commission's decision for further proceedings. *Georgia Power Co. v. FCC*, No. 84-1494 (D.C. Cir. Mar. 31, 1987).

2. On July 15, 1988, All Remaining Partners (ARP), the consortium that acquired the complainants in this case, submitted a request for dismissal of the complaint and termination of the proceeding, advising that there no longer are issues in controversy.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Group W Cable, Inc. and Westinghouse Broadcasting and Cable, Inc. IS DISMISSED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] Memorandum Opinion and Order, Mimeo No. 3314 (released Apr. 5, 1984); *rev. denied* Memorandum Opinion and Order, FCC 84-410 (Sept. 7, 1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-5

In the Matter of

Amendment of §§ 22.501(g)(2) and 94.65(a)(1) of the Rules and Regulations to Re-Channel the 900 MHz Multiple Address Frequencies	RM-5206
Amendment of § 94.65(a)(1) of the Rules to Revise Footnote 3 in the Frequency Table to Make the Frequencies Available for use by any Part 94 Eligible	RM-5362
Amendment of Part 2 and §§ 94.63(d)(5) and 94.65(a)(1) Footnote 3 of the Rules to Permit Operation of Mobile Remote Meter Reading Systems on a Primary Basis on the Exclusive Power Radio Service Frequencies in the 952.3625 - 952.8375 MHz Band	RM-5178
Amendment of Part 94 of the Rules to Permit Intrasystem Communications Among Multiple Address System Master Stations	RM-5383

ERRATUM

Released: September 14, 1988

1. On August 4, 1988, the Commission released an Order[1] granting a partial stay of the revised rules governing 900 MHz multiple address system (MAS) operations. The Order stayed the separation criteria codified in Section 94.63 of the Commission's Rules, 47 C.F.R. § 94.63, pending reconsideration of the Report and Order in the above-captioned docket.[2]

2. This document corrects a typographical error in the Order that created an inconsistency between the processing date for options provided to the applicants affected by the stay and the effective date of the revised rules. Accordingly, paragraph four [¶ 4] of the Order granting the stay is corrected to specify that the three stated options will be available to applicants for multiple address station licenses filed on or after May 11, 1988.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Order, PR Docket No. 87-5, FCC 88-255, 53 Fed. Reg. 32901 (August 29, 1988).

[2] Report and Order, PR Docket No. 87-5, 3 FCC Rcd 1564 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Accounting for the Tax Timing Difference Associated with IRS Summary Assessment — AAD 7-1761

MEMORANDUM OPINION AND ORDER

Adopted: September 2, 1988; Released: September 15, 1988

By the Commission:

I. INTRODUCTION

1. On September 18, 1987, pursuant to Section 1.115 of our rules, BellSouth Corporation, South Central Bell Telephone and Southern Bell Telephone and Telegraph Company (BellSouth), and Pacific Bell and Nevada Bell (Pacific Telesis) filed applications for review of an action taken on August 19, 1987, by the Chief, Accounting and Audits Division, in Responsible Accounting Officer Letter No.8 (RAO-8).[1] The applications claim that RAO-8 provides inappropriate instructions to account for the tax effects of a difference in the book and tax treatment of interest paid to the Internal Revenue Service (IRS) as part of a summary assessment.[2]

II. BACKGROUND

2. Under the provisions of Part 31 of our rules, [3] income tax expense related to taxable income for the current period is recorded in Account 306, Federal Income Taxes--Operating, and the liability to the IRS for this tax expense is recorded in Account 166, Taxes Accrued. Deferred income tax expense and related deferred tax liabilities resulting from normalization accounting for differences between book income and taxable income are not recorded in Account 306 or Account 166. Deferred income tax expense is recorded in Account 308.1, Operating Federal Income Taxes Deferred--Accelerated Tax Depreciation, or Account 308.2, Operating Federal Income Taxes Deferred--Other, as appropriate, and the related deferred tax liabilities are recorded in Account 176.1, Accumulated Deferred Income Taxes--Accelerated Tax Depreciation, or Account 176.2, Accumulated Deferred Income Taxes--Other.

3. Under normalization accounting carriers are able to record income tax expense on their books even though payment of the tax to the IRS is deferred until later years due to timing differences in the recognition of expenses for book and tax purposes. Because the deferred tax liabilities recorded in Accounts 176.1 and 176.2 represent taxes which have been collected from ratepayers through revenue requirements but have not yet been paid to the IRS, Section 65.830 of our rules provides for the reduction of a carrier's rate base by the balances in these accounts because they represent a source of cost-free capital.

4. On June 17, 1987, the Ameritech Operating Companies[4] (Ameritech) and Bell Tri-Co Services on behalf of Mountain Bell, Northwestern Bell, and Pacific Northwest Bell (US West) requested authorization under Sections 31.176:2 and 31.308:2 of our rules to follow normalization accounting for tax timing differences resulting from the payment of an IRS summary assessment. A similar request was filed by the New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) on July 20, 1987. The carriers had recorded the payment to the IRS in Account 139, Other Deferred Charges because the assessment was being disputed. The requesting parties explained that the interest portion of the summary assessment payment was deducted as an expense for federal income tax purposes but was deferred in Account 139 for book purposes. The deduction of the interest for tax purposes but not book purposes created a difference in the calculation of tax expense based on book income and the calculation of actual taxes currently due for tax payment purposes.

5. Ameritech, US West, and NYNEX were given approval by the Commission staff to normalize the tax effects of the different book and tax treatment of the interest portion of the IRS summary assessment in letters dated July 2, July 14, and July 31, 1987, respectively. Accordingly, Ameritech, US West, and NYNEX recorded a deferred tax expense in Account 308.2, Operating Federal Income Taxes Deferred--Other, and a deferred tax liability in Account 176.2, Accumulated Deferred Income Taxes--Other.

6. The Chief, Accounting and Audits Division, being apprised of similar situations with the other Bell Operating Companies (BOCs) and the possibility that other BOCs might treat the summary assessment differently, issued RAO-8 to ensure uniform accounting for the transaction among carriers. RAO-8 concluded that the different book and tax treatment of the interest resulted in a timing difference and that, under Part 31, the tax effects of such differences should be flowed-through in the form of reduced tax expenses for the current period unless permission was received to normalize the tax effects pursuant to Sections 31.176:2 and 31.308:2 of the rules.

7. The applications for review were filed September 18, 1987. By December 1987, all of the BOCs had filed requests for normalization accounting in the event this matter could not be resolved in their favor by December 31, 1987. These requests were tentatively approved pending a final decision on the applications for review.[5]

III. APPLICATIONS FOR REVIEW

8. In the applications for review, BellSouth and Pacific Telesis oppose RAO-8 for essentially the same reasons. Both parties expect to recover most, if not all, of the tax and interest from the IRS through a refund or settlement. Because they expect to recover the interest paid under the summary assessment, they believe the interest will never be deducted from pretax book income in any future period. They contend that if the transaction will never affect pretax book income, it does not meet prevailing criteria under generally accepted accounting principles (GAAP) for treatment as a tax timing difference. They propose to record tax expense in Account 306, Federal Income Taxes--Operating, based upon pretax book income. Since pretax book income is higher than taxable income by the amount of the interest deducted for tax purposes, their proposed

treatment results in more tax expense in Account 306 than is actually payable to the IRS. They propose to record the difference between the tax expense so recorded and the lower taxes payable to the IRS as a deferred credit in Account 174, Other Deferred Credits.

IV. COMMENTS AND REPLY COMMENTS

9. Interested parties were invited to file comments on the applications for review by October 21, 1987, and reply comments by November 2, 1987. Comments were filed by Ameritech, NYNEX, and the Southwestern Bell Telephone Company (Southwestern Bell). Reply comments were filed by the Bell Atlantic Telephone Companies[6] (Bell Atlantic) and BellSouth.

10. Ameritech and NYNEX both disagree with the applicants' position that normalization accounting is inappropriate. Ameritech states that the applicants misinterpret the definition of a timing difference in Accounting Principles Board Opinion No. 11, "Accounting for Income Taxes", (APB-11).[7] Ameritech believes that the interest portion of the summary assessment is a timing difference under GAAP and presents an opinion from the public accounting firm of Arthur Andersen and Company supporting its position. Ameritech explains that for book purposes the entire payment to the IRS is charged to Account 139, Other Deferred Charges, pending resolution, while for tax purposes the interest portion is currently deductible. Ameritech states that this creates a tax timing difference between pre-tax accounting income and taxable income in 1987. Furthermore, Ameritech states that regardless of the final disposition of the dispute with the IRS, there is a tax timing difference.

11. NYNEX believes that the applications for review are founded upon an incorrect interpretation of Part 31 of our rules. NYNEX contends that there is no basis in Part 31 for the applicants' position that amounts initially recorded as a current tax liability can be transferred to Account 174, Other Deferred Credits. NYNEX points out that Part 31 requires any offsetting entries to the current tax liability account to be recorded in current tax expense accounts and that the only exception to this treatment relates to normalization of income taxes.

12. Southwestern Bell supports the applicants' position that the treatment of the interest portion of the summary assessment as a tax timing difference is inappropriate. Southwestern Bell believes that payment of the summary assessment is not a final resolution of this dispute nor a determination of liability for the tax years in question. Southwestern Bell states that those amounts will, therefore, never enter into the pretax accounting income which it claims is an integral element of the definition of timing differences.

13. In its comments, Southwestern Bell offers an accounting alternative to record the transaction if the Commission denies the applications for review. Southwestern Bell suggests recording the tax effect of the different book and tax treatment of the interest by crediting Account 380, Income Tax Effect of Extraordinary and Delayed Items--Net, rather than Account 176.2 as RAO-8 requires. Southwestern Bell would then transfer that amount from Account 380 to Account 174 which is the same balance sheet account that BellSouth and Pacific Telesis believe is proper.[8] Southwestern Bell claims that this accounting for the transaction will neither affect the rate base nor regulated net income.

14. BellSouth, in its reply comments, alleges that the record is clear that payment of the summary assessment (including interest) represents an incomplete transaction that is properly journalized to Account 139, until final disposition is determined.[9] On that basis, BellSouth contends that the associated tax effect should also be accounted for consistently as an item awaiting final disposition and states that this can be accomplished by crediting the tax effect to Account 174 which, among other things, provides for inclusion of revenue, expense, and income items in suspense. BellSouth feels that Ameritech and NYNEX have passed over this issue and instead focused on the technical definition of a timing difference, and on whether Account 174, Other Deferred Credits, is an appropriate offset to the current tax liability account, thus misplacing their focus. BellSouth believes Ameritech is incorrect in its interpretation that APB-11 supports a position that the interest portion of the summary assessment is a tax timing difference. BellSouth asserts that APB-11 does not provide for interperiod tax allocation of items that affect taxable income but do not affect book income.[10] BellSouth believes NYNEX's assertion that Part 31 restricts offsetting the current tax liability to the current tax expense account is without merit. BellSouth maintains that our rules clearly contemplate and encompass the accounting treatment recommended by BellSouth because NYNEX's accounting is not appropriate for items in suspense.

15. Ameritech, while agreeing there is a timing difference that should be normalized using the appropriate accumulated deferred tax account, notes that Southwestern Bell raises a valid concern about the possibility of inappropriate rate base treatment of the accumulated deferred tax balance in Account 176.2, Accumulated Deferred Income Taxes--Other. However, Ameritech states that the solution is in the ratemaking process, not incorrect accounting. The appropriate ratemaking, according to Ameritech, is to include the balances in Accounts 139, Other Deferred Charges, (for the payment) and 176.2, Accumulated Deferred Income Taxes--Other, (for the tax effects) in the computation of the rate base. If for some reason the Commission does not allow the deferred charge for the payment into the rate base, Ameritech asserts that the related deferred taxes should not be deducted from the rate base.

16. Bell Atlantic in its reply comments states that, regardless of how the accounting issue is resolved, the Commission should ensure that the income tax effects of the different book and tax treatment of interest expense are not reflected in rates as a deduction from the rate base unless the payment of the summary assessment recorded as a deferred charge is also included in the rate base. As another accounting alternative, Bell Atlantic proposes netting the tax effects in the same account used to record the summary assessment (*i.e.*, Account 139) to ensure that all of the impacts of the summary assessment are completely removed from the ratemaking process.

V. DISCUSSION

17. The primary basis for the applicants' contention that the accounting instructions in RAO-8 are inappropriate is their contention that the difference between book income and taxable income caused by the interest deduction for tax purposes does not meet the technical definition of a tax timing difference set forth in APB-11. Ameritech

strongly asserts, on the other hand, that this is a timing difference under APB-11. Whether it meets the technical definition of APB-11 or not, however, there is clearly a timing difference between book income and taxable income involved here. The carriers deducted the interest for tax purposes but not for book purposes in 1987. When the dispute over the summary assessment is resolved, the carriers will either deduct the interest for book purposes if the IRS prevails or they will have an increase in taxable income if they prevail. In either event, there will be an offsetting difference between book income and taxable income in the year that the dispute is resolved. It should be noted that, if the IRS prevails, this timing difference clearly meets the APB-11 definition of a timing difference. The applicants' contention that this does not meet the APB-11 definition depends on them prevailing and receiving a refund from the IRS. In this proceeding, we do not have to resolve the difference of opinion as to whether this timing difference meets the GAAP definition because, as NYNEX correctly points out in its comments, the accounting in this case is governed by Part 31 which clearly prescribes the accounting set forth in RAO-8.

18. Under the provisions of Part 31, carriers may not record income tax expense in excess of taxes currently payable to the IRS except for tax normalization related to accelerated tax depreciation as provided for in Section 31.3-32 and for normalization related to other book and tax differences when specific approval has been obtained as provided in Sections 31.176:2 and 31.308:2. When tax normalization is permitted under Part 31, the accounts to be used to record it are specifically prescribed. For differences not related to depreciation, as in this case, the normalized tax expense would be charged to Account 308.2, Operating Federal Income Taxes Deferred--Other, and the deferred tax liability would be credited to Account 176.2, Accumulated Deferred Income Taxes--Other.

19. In their applications for review, BellSouth and Pacific Telesis seek review of RAO-8 because they believe nullification of RAO-8 would permit them to adopt the accounting proposed in their applications. It should be noted, however, that RAO-8 did not modify the provision of Part 31. RAO-8 merely reminded carriers of the provisions of Part 31 in order to assure accounting uniformity among several carriers affected by essentially the same transaction. Thus, the carriers' proposed accounting must comply with the provisions of Part 31 which would still apply in the absence of RAO-8.

20. Under the accounting proposed by the applicants, they would record income tax expense on their books in excess of their current tax liability. The effect of their proposed accounting would be to normalize income tax expense based on book income but without obtaining approval for tax normalization as required by Part 31 and without using the accounts established for tax normalization under Part 31. Since the accounting proposed by the applicants would be inconsistent with the provisions of Part 31, their petition for review of RAO-8 is denied, and the accounting as set forth in RAO-8 is reaffirmed.

21. It should be noted the BellSouth's contention that Account 174 is the appropriate account to record the deferred tax liability because it relates to a suspense item is incorrect. The deferred tax resulted from a tax timing difference and the accounts for recording tax timing differences are specifically required. We have also considered the alternative accounting proposed by Bell Atlantic which would net the deferred tax liability against the summary assessment recorded in Account 139. This accounting is incorrect, however, because it would overstate current taxes in Account 306 above the taxes currently payable and would improperly classify the related deferred tax liability.

22. The applicants and most of the commenting carriers assert that the deferred tax liability should not be deducted from the rate base. They further argue that the summary assessment payment that has been recorded as a deferred charge should be included in the rate base if the deferred tax liability is deducted. This argument suggests that it would be illogical to deduct an item identified as a cost-free source of capital from carriers' other rate base assets, especially when that cost-free source of funds is so clearly related to an item that would not be included in the rate base.

23. In our view, the carriers have not made a persuasive case for not deducting the deferred tax liability recorded in Account 176.2 from the rate base as provided in Part 65. This rate base reduction is not and should not be dependent upon the ratemaking treatment accorded the deferred charge recorded in Account 139. The rate base treatment of the balances in Account 176.2 and Account 139 are determined by separate provisions under Part 65 of our rules. These are separate ratemaking issues, and they should be separately considered.

24. The deferred tax liability related to the interest portion of the summary assessment is no different than other deferred tax liabilities. Deferred tax liabilities represent taxes which have been charged to expense and recovered from ratepayers through revenue requirements but which have not yet been paid to the IRS. Deferred tax liabilities are therefore regarded as a source of cost-free capital under Part 65. This condition exists regardless of the ratemaking treatment of the summary assessment payment recorded in Account 139. Thus, we see no basis for making an exception to the provisions of Part 65 for the deferred tax liability related to the interest portion of the summary assessment.

25. The treatment of the summary assessment payment recorded in Account 139, Other Deferred Changes, is not as clearly supported by the provisions of Part 65. The general rule is that amounts recorded in this account will be excluded from the rate base unless some showing can be made that they are "used and useful" in the provision of telecommunications services.[11] The carriers have made no showing in this proceeding that would support the inclusion of Account 139 with respect to the summary assessment payment in the rate base. Moreover, we believe it would be difficult to make such a showing. More than half of the deferred charge in Account 139 relates to the interest paid to the IRS. Even if the carriers had charged this interest to expense when paid, it would not have been recoverable from the ratepayers through additional revenue requirements because interest is recovered in the return component which would remain the same for the period whether the interest was deferred or charged to expense. Thus, the carriers have not foregone any recovery from the ratepayers as a result of deferring the interest charge. In our view, therefore, the interest payment deferred in Account 139 should not be included in the rate base. In the absence of a showing by the carriers that the summary assessment payment deferred in Account 139 meets the "used and useful" test required for inclusion in the ratebase, we cannot approve its inclusion in the rate base.

VI. ORDERING CLAUSE

26. Accordingly, IT IS ORDERED that BellSouth's and Pacific Telesis' applications for Review of the accounting required by RAO-8 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] RAO Letters are used by the Accounting and Audits Division to communicate technical accounting instructions and standard accounting practices to common carrier accounting officers who are responsible for the certification of Annual Report Form M filed with this Commission.

[2] The summary assessment was imposed by the IRS on the American Telephone and Telegraph Company and Bell Operating Companies and relates to certain 1979 and 1980 investment tax credits.

[3] Part 31 was the uniform system of accounts for telephone companies in effect in 1987; it was replaced by Part 32 effective January 1, 1988.

[4] The Ameritech Operating Companies are Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell and Wisconsin Bell.

[5] Letters from the Chief, Accounting and Audits Division to: Ameritech Information Technologies, July 2, 1987; Bell Tri-Co Services, July 14, 1987; NYNEX Service Company, July 31, 1987; and Bell Atlantic Network Services, Inc., BellSouth Corporation, Pacific Telesis Group and Southwestern Bell Telephone Company, January 12, 1988.

[6] The Bell Atlantic Telephone Companies are Bell Telephone Company of Pennsylvania, Diamond State Telephone Company, New Jersey Bell, Chesapeake and Potomac Telephone Company, Chesapeake and Potomac Telephone Company of Virginia, Chesapeake and Potomac Telephone Company of Maryland and Chesapeake and Potomac Telephone Company of West Virginia.

[7] The Accounting Principles Board was a predecessor of the Financial Accounting Standards Board and served as a standards-setting body from 1959 to 1973.

[8] It should be noted that the net effect of this alternative accounting proposed by Southwestern Bell is exactly the same as the accounting proposed by BellSouth and Pacific Telesis; therefore, Southwestern Bell's proposed accounting will not be considered separately from the BellSouth and Pacific Telesis proposals.

[9] All parties have recorded the payment in Account 139, Other Deferred Charges as the first step.

[10] This assumes the dispute with the IRS will be decided in the carriers' favor.

[11] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269, 275, para. 43 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company
Petition To Rectify Terms and Conditions
of 1985 Annual Access Tariffs

ORDER

Adopted: September 7, 1988; Released: September 15, 1988

By the Chief, Common Carrier Bureau:

1. In a *Declaratory Ruling* released August 19, 1988, in the above-referenced proceeding, the Common Carrier Bureau (the Bureau) reaffirmed that local exchange carriers must accord their interstate access customers the same rights to receive interest on retained customer funds as they grant themselves with respect to late payments.[1] In particular, the Bureau found to be unlawful tariff penalty interest provisions that fail, at a minimum, to give access customers the right to interest on overcharges from the date of overpayment when claims are filed within 90 days of the payment due date, and from the later of the claim date or the date of overpayment when claims are filed more than 90 days after the payment due date.[2] Since adoption of the *Declaratory Ruling*, it has been brought to our attention that there is some ambiguity regarding the obligations of local exchange carriers in the wake of our findings regarding penalty interest provisions in their tariffs. We are adopting this Order to dispel this uncertainty.

2. Accordingly, IT IS ORDERED that all local exchange carriers with interstate tariffs containing penalty interest provisions that do not comply with the standards set forth in the *Declaratory Ruling* must file revisions to their tariffs for the purpose of removing the unlawful material not later than September 26, 1988. For the purpose of this filing, which is to be made on 15 days' notice, Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, IS WAIVED and Special Permission No. 88-413 IS ASSIGNED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] American Telephone and Telegraph Company Petition To Rectify Terms and Conditions of 1985 Annual Access Tariffs, Declaratory Ruling, DA No. 88-1165, released Aug. 19, 1988, at paras. 14-21 (*Declaratory Ruling*).

[2] *Id.* at para. 21.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BUSINESS TELECOMMUNICATIONS CORPORATION

File No. 21452-CD-P/L-01-87

For authority to construct
a new Station KNKJ930 operating
on frequency 454.350 MHz at
Chicago, Illinois

MEMORANDUM OPINION AND ORDER

Adopted: September 7, 1988; Released September 15, 1988

By the Chief, Mobile Services Division:

1. Robert H. Schwaninger, Jr. and Scott Lorenzen d/b/a S & S of Illinois (collectively, S&S) filed a petition to deny the captioned mutually exclusive application of Business Telecommunications Corporation (BTC). Responsive pleadings were filed.[1] BTC's application was selected first in the lottery conducted on May 6, 1988.[2]

CONTENTIONS OF THE PARTIES

2. S&S claims that BTC failed to report a transfer of control, and that this failure requires denial of the application. In support, S&S states that in 1978, BTC's stock was transferred to Goeken Communications, Inc. (GCI). At this time, John Goeken (Goeken) had complete control of GCI. S&S further states that in February 1983, BTC filed an ownership report (FCC Form 430), saying it was wholly owned by GCI but listed Goeken as owning 27.8 percent of GCI. According to S&S, it is apparent that Goeken did not hold legal or beneficial ownership of GCI as he had sold about 35 percent of GCI (including his controlling interest) to seven investment companies. S&S asserts this transfer of control triggered a duty to request from the Commission authority to transfer of control. S&S therefore contends that BTC must file an amendment to its application to reflect the transfer of control of its parent. Under Section 22.23(c)(4) of the Rules, the filing of such amendment would require a new filing date for the application. This in turn, S&S continues, would put BTC's application beyond the cut-off date for filing of applications mutually exclusive to S&S' application. Consequently, S&S argues, BTC's application should be denied as untimely filed.

3. In opposing the petition, BTC contends that when its current pending application was filed and continuously since then, Goeken has owned more than 50 percent of GCI's stock. The ownership structure of both GCI and BTC has remained constant since then. BTC says that since there was no transfer of control of either GCI or BTC since the filing of BTC's current pending application, no amendment need be filed. BTC maintains that both before and after the filing of BTC's application, Goeken has controlled a majority of the stock of GCI and served as its sole director. Moreover, BTC adds, it is a wholly-owned subsidiary of GCI and thus controlled by Goeken. As a result, BTC argues that S&S has failed to state any basis for its claim that a major amendment of BTC's application is required. Moreover, BTC goes on to say that S&S' transfer-of-control allegations are irrelevant because the Commission has been fully apprised of the various stock transfers and sales by GCI and/or BTC. [3]

DISCUSSION

4. We agree with BTC that from the time it filed the pending application to the present, control of the station has been in the same hands, (Goeken). There has not been a transfer of control of either GCI or BTC from the time of the filing of the captioned application, therefore, the application does not have to be amended. Moreover, the record shows that control of GCI remained with Goeken during 1979 and 1980. Because of the remoteness of these past incidents, we will not inquire into these matters any further.

5. In light of BTC's first-place ranking in the lottery, S&S' failure to demonstrate any basis to deny BTC's application, and our review of BTC's application, we will grant BTC's application. We find BTC qualified to be a Commission licensee and that grant of this application is in the public interest.

ORDERING PARAGRAPHS

6. Accordingly, IT IS ORDERED that the petition to deny filed by Robert H. Schwanger, Jr. and Scott Lorenzen d/b/a S & S of Illinois IS DENIED.

7. IT IS FURTHER ORDERED that the application filed by Business Telecommunications Corporation, File No. 21452-CD-P/L-01-87, IS GRANTED.

8. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] S&S' application, File No. 20331-CD-P/L-01-87, was filed on October 22, 1986; BTC's application was filed on January 2, 1987.

[2] *See* Lottery Notice, Mimeo No. 2419, released Apr. 6, 1988, at 2 (PLMS- 28-8 454 MHz) and Public Mobile Service Lottery PMS-28, Mimeo No. 2934, released May 1, 1988, at 2.

[3] BTC states that Goeken's ownership in GCI was reduced to 30 percent in 1979 due to the purchase by some investors of certain preferred stock of GCI. The terms of such stock, including voting

rights, were reported to the Commission. According to BTC, the institutional investors did not participate in any BTC management activities, and during this time, Goeken remained in both *de jure* and *de facto* control of GCI, serving as the sole director as well as manager of all daily corporate affairs. BTC says that in July 1980, the preferred stock was restructured in connection with the sale by GCI of its then-main operating subsidiary and the preferred stock became subject to redemption by GCI. According to BTC, after giving effect to such redemptions, Goeken has maintained more than 50-percent voting control of GCI for a substantial period of time prior to the filing of the captioned application until the present. Moreover, BTC asserts that Goeken has always been, and remains GCI's sole director and, notwithstanding the voting rights attendant to the preferred stock, Goeken has made all GCI business and operating decisions, and the preferred stock holders have never been involved in the business.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

A Closed Circuit Test of the
National-Level Interconnecting
Systems and Facilities and
Program Origination Channels
of the Emergency Broadcast
System.

ORDER

Adopted: September 6, 1988; Released: September 15, 1988

By the Managing Director:

1. The Commission has received a request from the Federal Emergency Management Agency and the White House Communications Agency to conduct a Closed Circuit Test of the National-Level interconnecting systems and facilities of the Emergency Broadcast System (EBS) during the week of September 19, 1988.

2. This request has been coordinated with the major radio networks by Mr. Rusty Lutz of ABC Inc.

3. Coordinated arrangements have been made with the White House Communications Agency, the Federal Emergency Management Agency, the major Radio Broadcast Networks (ABC, AP Radio, CBS, MBS, NBC, NPR, United Stations and UPI Audio) and the American Telephone and Telegraph Company (AT&T).

4. Accordingly, pursuant to authority delegated to the Managing Director in his capacity as Defense Director, IT IS ORDERED that a Closed Circuit Test of the EBS be conducted during the week of September 19, 1988, in accordance with Section 73.962 of the Rules.

5. Authority for the adoption of this action is contained in Section 1, 4(i), 4(o), and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Minkel
Managing Director

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MOBILECOMM OF ALABAMA, INC. File No. 27056-CD-TC-88

Consent to Transfer of Control of
Public Land Mobile Service Stations
KIF650, KRS687, KRS664, and KTS206
from Mobile Communications Corporation
of America to BellSouth Corporation

RADIO & ELECTRONICS SERVICE COMPANY File No. 27114-CD-TC-88

Consent to Transfer of Control of
Public Land Mobile Service Stations
KLF639, KIY593, KWB455, KLF640, and
KIF649 from Mobile Communications
Corporation of America to BellSouth
Corporation

ORDER

Adopted: September 7, 1988; Released: September 8, 1988

By the Chief, Mobile Services Division:

1. On August 31, 1988, American Mobilphone Paging, Inc. (American) filed a "Motion for Extension of Time" in the captioned proceeding. American seeks a two-week extension up to and including September 16, 1988, in which to reply to the "Opposition of BellSouth Corporation and Mobile Communications Corporation of America to Petition to Dismiss or Deny of American Mobilphone Paging, Inc.," which was filed on August 23, 1988. BellSouth Corporation and Mobile Communications Corporation of America (BellSouth/MCCA), on September 2, 1988, filed an opposition to American's motion to extend the reply date. The deadline for American's reply was September 2, 1988.

2. In support of its request, American argues that an extension will enable it to consider the "highly complex issues" regarding the BellSouth/MCCA merger, and to coordinate with its counsel on "various factual matters that concern this merger." (American Motion at 2.) In its opposition, BellSouth/MCCA contends that American's motion is unjustified and should be denied. Specifically, BellSouth/MCCA argues, the "highly complex issues" to which American refers were raised by American in its own Petition to Dismiss or Deny, and were not raised for the first time in BellSouth/MCCA's Opposition to the Petition. Moreover, BellSouth/MCCA asserts, American's need to coordinate on "factual matters" does not justify an extension because a reply "may not raise factual issues that could or should have been raised in the original petition to deny." (BellSouth/MCCA Opposition to Motion at 5.)

3. American has failed to demonstrate good cause to warrant a grant of a two-week extension of time in which to file a reply. *See* Section 1.46(a) of the Commission's Rules. However, given that the Labor Day holiday has delayed our action on American's request, we will allow a reply to be filed up to and including September 9, 1988.

4. Accordingly, American's motion for an extension is DENIED to the extent indicated herein, and BellSouth/MCCA's opposition to the motion is GRANTED to the extent indicated herein. Effective on the release of this *Order*, the reply deadline in the captioned proceeding will be *September 9, 1988.*

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 67 (New Part 36)
of the Commission's Rules and
Establishment of a Joint Board

ORDER

Adopted: September 7, 1988; Released: September 8, 1988

By the Chief, Common Carrier Bureau:

1. The United States Telephone Association (USTA) has requested an extension of time in which to file comments and data on the allocation of Revenue Accounting Expenses as requested by the Commission in its Supplemental Notice of Proposed Rule Making. *MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules*, CC Docket Nos. 78-72, 80-286, 80-287, FCC 88-216, released August 8, 1988. USTA requests that the time for filing comments and data be extended from September 9, 1988, to September 16, 1988, and that the time for filing replies be extended from September 26, 1988, to October 14, 1988.

2. In support of its request, USTA states that it conducted an *ex parte* meeting with members of the Commission staff to resolve questions raised by USTA members regarding the data request.[1] USTA maintains that the items discussed at that meeting required further explanation before the carriers could begin to respond to the data request. Based on those discussions, USTA states that it will provide information in the form of guidelines and that the local exchange carriers will require additional time to ensure that they receive the guidelines and can incorporate the clarifications into their responses. USTA also asserts that the carriers will require additional time to analyze and summarize the data filed.

3. The Common Carrier Bureau has reviewed USTA's motion and has determined that good cause has been shown for an extension of time for filing comments, data and replies. We believe, however, that a ten day extension of time for filing replies will provide the parties adequate time to review the comments and data filed in this proceeding. We therefore grant USTA and all other interested parties an extension until *September 16, 1988*, to file comments and data, and an extension until *October 6, 1988*, to file replies.

4. Accordingly, IT IS ORDERED, That the motion for extension of time filed by USTA is GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Letter to H. Walker Feaster, Acting Secretary, August 23, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MTS and WATS Market Structure	**CC DOCKET NO. 78-72**
	CC DOCKET NO. 80-286
	CC DOCKET NO. 86-297

Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board

ORDER ON RECONSIDERATION AND SUPPLEMENTAL NOTICE OF PROPOSED RULE MAKING

Adopted: June 27, 1988; Released: August 8, 1988

By the Commission:

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APPENDICES

Appendix A: Rule Amendments to Part 36 of this Commission's Rules

Appendix B: Revenue Accounting Expenses Data Request

Appendix C: List of Joint Board Commissioners and Staff

I. INTRODUCTION AND SUMMARY

1. Several parties have filed petitions seeking reconsideration or clarification of the revisions to the Separations Manual recently adopted by this Commission.[1] In revising the Manual, we adopted the recommendations of the Docket 80-286 Joint Board and the Docket 86-297 Joint Board and recodified the Separations Manual, formerly Part 67 of this Commission's Rules, as the new Part 36 effective January 1, 1988.[2] In this Order, we generally affirm our decision regarding the new separations procedures. To the limited extent indicated below, however, we grant the petitions for reconsideration and clarification. In this Order we: (1) reconsider our decision to require that carriers count intermediate terminations when assigning the costs in Category 4.23 Central Office Equipment (COE), All Other Interexchange Circuit Equipment; (2) seek further comment and data on the new procedures for Revenue Accounting Expenses, refer this issue to the

Docket 80-286 Joint Board and, pending resolution of this inquiry, reinstate the former Part 67 procedures for Other Billing and Collecting Expense on an interim basis; (3) simplify Lifeline Connection Assistance Expense procedures; (4) deny petitions seeking reconsideration of the new separations procedures for Category 3 COE, Local Switching Equipment, except to the limited extent necessary to clarify the calculation of the transition from the Part 67 allocation factors to the new Part 36 allocation factor; (5) deny petitions seeking changes in the separations procedures for Category 1 COE, Operator Systems Equipment; (6) affirm our decision to adopt one Separations Manual for use by both large and small carriers; (7) affirm our decision to adopt different factors for large and small carriers to use in the allocation of General Support Facilities; (8) revise the Separations Manual to allow NECA to adjust the Universal Service Factor (USF); and, (9) affirm the legal basis for our decision to adopt the new Part 36 procedures. In Section II of this Order, we discuss the general background of the proceedings in which the Joint Boards and this Commission acted. In Section III, we discuss the background, positions of parties and resolution of the issues in an issue-by-issue format.

II. BACKGROUND OF PROCEEDINGS

2. In 1980, we established the Docket 80-286 Joint Board to examine the procedures for the allocation of local exchange plant between the state and interstate jurisdictions. [3] As part of that comprehensive review, and based on recommendations of the Docket 80-286 Joint Board,[4] we adopted certain revisions of the separations rules applicable to COE.[5] In that proceeding, we consolidated the former eight categories of COE into four categories and revised certain allocation factors. We consolidated the former Categories 4, 5, 6, and 7 COE into the new Category 3 COE, Local Switching Equipment, and decided that the investment in this category will be allocated on the basis of dial equipment minutes (DEM). We decided to phase-in the DEM allocation factor over a five-year period which began January 1, 1988, and to weight that factor for small carriers with 50,000 or fewer access lines. We also decided, however, to ask the Docket 80-286 Joint Board to reexamine alternatives to the DEM allocation factor for the new Category 3 COE and to submit a recommendation.[6]

3. The *Report and Order* also adopted new procedures for Circuit Equipment which recategorized the former Category 8 COE as Category 4 COE. These new procedures require the local exchange carriers (LECs) to allocate their investment in the Joint Message subcategory of 4.23 COE, All Other Interexchange Circuit Equipment, on the basis of conversation-minutes and require interexchange carriers (ICs) to freeze the allocation factor for their investment in Category 4.23 COE at 1985 levels. The Docket 80-286 Joint Board is currently considering the categorization and allocation of Category 4 COE.[7]

4. In 1987, based on the recommendations of the Docket 80-286 Joint Board,[8] we also revised the separations procedures applicable to the Revenue Accounting Expenses formerly in Account 662 and currently in Accounts 6620 and 6623.[9] The adoption of new Revenue Accounting Expenses procedures was prompted by statements by AT&T that it would begin performing some of its own billing and collecting functions, previously performed on its behalf by the LECs. We therefore adopted new procedures that we believed would reduce interstate assignments to reflect the reduction in the LECs' interstate billing and collecting services.

5. At the same time the Docket 80-286 Joint Board was considering these issues, we established the Docket 86-297 Joint Board to conform the separations rules to the revised Uniform System of Accounts (USOA)[10] and to simplify the separations rules.[11] Based on the recommendations of the Docket 86-297 Joint Board[12] we adopted comprehensive revisions of the Separations Manual.

6. The new Separations Manual became effective January 1, 1988, and was codified as the new Part 36 of our Rules. That new manual includes the revisions recommended by the Docket 86-297 Joint Board, the revisions recommended by the Docket 80-286 Joint Board discussed above, and other revisions recommended by the Docket 80-286 Joint Board.

7. Most of the petitions seeking reconsideration of the new Separations Manual object to the allocation procedures we originally adopted for the marketing expenses in Account 6610. In response to these petitions, and in response to a letter from the state commissioners on the Docket 86-297 Joint Board, we reconsidered our decision regarding marketing expenses and referred this issue to the the Docket 80-286 Joint Board for a recommendation of a permanent solution.[13] That Joint Board recently issued an *Order Inviting Comments* seeking further comment and data on the marketing expenses issue.[14] That issue is currently pending before the Docket 80-286 Joint Board and will not be addressed in this Order.

III. ISSUES AND DISCUSSION

A. Category 4 Central Office Equipment

1. Background

8. Under the former Part 67 procedures, all carriers' investment in the former Category 8.23 COE, All Other Interexchange Circuit Equipment, was assigned to the various subcategories of circuits on the basis of circuit mile studies and the Joint Message subcategory was allocated between the jurisdictions on the basis of conversation-minute-miles. In its *COE Order Inviting Comments*,[15] the Docket 80-286 Joint Board requested comment on several plans for the categorization and allocation of Category 8.23 COE and requested that parties file data to aid in the evaluation of those plans. Under one of those plans, Plan 8D, distance-sensitivity would be eliminated from the allocation factor for Category 8.23 COE and the costs in that category would be assigned to classes of circuits on the basis of an average cost per circuit termination rather than on the basis of average cost per circuit mile. Under Plan 8D, and the accompanying data request, carriers counted only terminations at the ends of circuits but not intermediate termination points on the circuits. The Docket 80-286 Joint Board recommended and we adopted this plan for the LECs and eliminated the mileage component from the allocation factor, requiring instead that LECs use the distance-insensitive allocation factor conversation-minutes. We also required that the LECs assign costs to the subcategories on the basis of an average cost per termination for all circuits.[16] We required, however, that carriers count intermediate terminations in assigning costs to the subcategories of Category 4.23 COE.[17]

9. In its *COE Recommended Decision and Order*,[18] the Docket 80-286 Joint Board rejected the arguments of Southwestern and Pacific that the assignment of Category 4.23 COE should be assigned based on counting each circuit only once regardless of how many terminations occur on that circuit. That Joint Board stated that, contrary to these arguments, a count of terminations is readily available and would not be administratively burdensome. The Docket 80-286 Joint Board observed that the use of a circuit count could result in a misallocation of costs because such a method would fail to recognize that because state circuits usually have two terminations in a study area, the termination costs for those circuits are proportionately higher than the termination costs for interstate circuits. That Joint Board found that the averaging of costs per circuit would therefore misallocate costs to the interstate jurisdiction and concluded that the use of termination counts would best reflect cost-causation principles. It also recommended that intermediate terminations be counted to recognize the potentially significant termination costs at intermediate locations. The Docket 80-286 Joint Board stated that the inclusion of intermediate terminations would be appropriate for most carriers' networks and would be adaptable to changes in technology.

2. Positions of Parties

10. In seeking reconsideration, Southwestern reasserts its arguments in favor of a circuit count factor but supports, in the alternative, an assignment based on a count of end terminations only. It states that either approach would simplify the separations process because carriers could use data that are readily available to assign the costs and would not need additional manpower or recordkeeping. It states that the data request issued with the *COE Order Inviting Comments* sought data on the various plans using a count of circuit terminations but did not require that intermediate terminations be counted. Thus, Southwestern states that in estimating the revenue requirement impact of the proposed plans, the carriers did not count intermediate terminations. Southwestern asserts that due to the large number of state circuits within a study area, a count that includes intermediate terminations may result in significant shifts in revenue requirement to the state jurisdiction, an effect that has not been fully evaluated by either the Docket 80-286 Joint Board or this Commission. NYNEX contends that if it had estimated the revenue requirement impact of the proposed rules by including intermediate terminations, it would have predicted a shift in revenue requirement to the state jurisdiction, rather than to the interstate jurisdiction. Southwestern also contends that the use of count of terminations including intermediate terminations may create inappropriate incentives to engineer uneconomic networks. NYNEX and GTE support the position that intermediate terminations should not be counted. Although NYNEX supports Southwestern's circuit count proposal in principle, it suggests that we seek data on the impact of that proposed method before adopting such an approach. GTE and Southwestern state that, contrary to the conclusion of the Docket 80-286 Joint Board, the number of intermediate termination points will decline, rather than increase, with new technology. GTE also argues that counting intermediate terminations would impose an administrative burden. It notes that reducing administrative burdens was one of the Docket 80-286 Joint Board's goals. Western Union opposes the elimination of intermediate terminations stating that, contrary to Southwestern's assertions, a count of such terminations is readily available. Moreover, Western Union argues that the exclusion of intermediate terminations would cause significant distortions in separations results because such a procedure would fail to recognize the significant investment in intermediate locations and would treat multi-point circuits in the same manner as two-point circuits.

11. Both NYNEX and Southwestern assert that the rules as written are ambiguous because the *COE Recommended Decision and Order* contains the only reference to intermediate terminations and the rule merely refers to terminations. NYNEX and Southwestern therefore assert that carriers may have properly characterized the rule as requiring a count of terminations at the ends of circuits only. NYNEX requests that we clarify that carriers should count terminations only at the ends of circuits.

12. NASUCA raises two additional Category 4 issues. It argues that we should examine the allocation of exchange circuit plant because it is concerned about the allocation of the equipment described in the carriers' Continuing Property Records as "unidentifiable circuit equipment." NASUCA asserts that, because it estimates this investment to be approximately 750 million, we should examine its apportionment. NASUCA also argues that we should modify the assignment of T-carrier investment to account for the approximately 40 percent differential in terminal costs between exchange and toll T-carrier facilities. NASUCA contends that the internal accounting systems of the carriers have failed to disaggregate the low cost terminal systems employed for basic exchange grade telephony and the more sophisticated and expensive T-carrier systems required for special services and message toll. NASUCA submits a summary of the results of a study undertaken by Wisconsin Bell at the request of the Wisconsin Public Service Commission staff and states that this study shows that widespread cross-subsidization occurs when carriers employ uniform average costs in assigning the unit investment of T-carrier systems. Southwestern responds that NASUCA either addresses implementation concerns or fails to understand the nature of circuit equipment costs. Southwestern suggests that this issue be explored in the ongoing proceeding before the Docket 80-286 Joint Board regarding Category 4 COE.

3. Discussion

13. We hereby reconsider our previous decision that all terminations, including intermediate terminations, must be counted by the LECs in assigning costs to the subcategories of Category 4.23 COE. We will require instead that LECs count only the terminations at the ends of circuits pending the outcome of the Docket 80-286 Joint Board's further inquiry into Category 4 COE cost assignment procedures.[19] We believe that a count of only end terminations would be consistent with the intentions of both the Docket 80- 286 Joint Board and this Commission. The *COE Order Inviting Comments* and the companion data request asked that carriers provide data regarding the revenue requirement impact of several proposed plans. In estimating the impact of Plan 8D, the Docket 80-286 Joint Board requested that LECs develop costs in the former Category 8.23 COE on the basis of a count of terminations, but that Joint Board did not specify that intermediate terminations should be counted. The record

in this proceeding indicates that in developing responses to that data request, the carriers counted terminations only at the ends of circuits.

14. Using this approach, the data revealed that adoption of Plan 8D would result in a shift in revenue requirement of 76 million to the interstate jurisdiction for the LECs.[20] We believe that, in recommending that Plan 8D be adopted by this Commission, the Docket 80-286 Joint Board expected that the actual revenue requirement impact of the adopted procedures would approximate the impact predicted by the carriers.[21] The petitions for reconsideration indicate that a count of all terminations, including intermediate terminations, may result in a significantly different revenue requirement impact and could result in a shift in revenue requirement to the state jurisdiction rather than the interstate jurisdiction.[22] Such a result would contravene the expectations of both the Joint Board and this Commission in adopting Plan 8D for the LECs.[23] Moreover, the impact of a count including intermediate terminations is currently unknown. We therefore conclude that to best achieve the goals and intended results in this proceeding, LECs should not count intermediate terminations in assigning the costs Category 4.23 COE. Because Section 36.126(e)(3) of our Rules currently refers only to a count of terminations, no rule revision is required to implement our decision in this Order. LECs shall implement this change effective January 1, 1989, and shall file revised access charges to reflect this change with a minimum of forty-five days notice.

15. We also reject the arguments of Southwestern that we should revise the rules to require a count of circuits rather than terminations. We remain concerned that a count of circuits would misallocate costs to the interstate jurisdiction because state circuits typically have two terminations in each study area and, therefore, the termination costs of state circuits are usually proportionately higher than the termination costs of interstate circuits.

16. We note that the cost assignment procedures for Category 4.23 COE are currently under consideration by the Docket 80-286 Joint Board in the proceeding examining Category 4 COE and Cable and Wire Facilities.[24] That Joint Board has requested that parties in that proceeding provide data that would aid in its analysis.[25] We believe that proceeding is the proper forum for further consideration of this issue. In addition, NASUCA has not demonstrated that we should adopt any changes at this time that have not been recommended by any Joint Board.

B. Revenue Accounting Expenses

1. Background

17. In the phase of Docket No. 80-286 examining the procedures applicable to the former Account 645, Local Commercial Expenses,[26] the Joint Board also examined the procedures applicable to the former Account 662, Revenue Accounting Expenses. Revenue Accounting Expenses represent a major portion of the costs incurred by the LECs in performing billing and collecting services for other carriers. In its *Recommended Interim Order and Request for Comments* [27] on the former Account 645, that Joint Board also requested comments on the need for changes in the procedures for the allocation and recovery of the Revenue Accounting Expenses. That Joint Board believed the procedures applicable to these expenses might require revision because AT&T planned to discontinue some of its use of the billing and collection services offered by the LECs. The Docket 80-286 Joint Board adopted an *Order Inviting Comments* concerning the appropriate separations treatment of Revenue Accounting Expenses, which requested comment on four options, including retention of the Part 67 rules.[28] This was followed by the *Account 662 Recommended Decision and Order* in which the Docket 80-286 Joint Board recommended new separations procedures for Revenue Accounting Expenses.

18. In the *Report and Order*,[29] we adopted the Joint Board's recommendation to revise the separations procedures applicable to Revenue Accounting Expenses to reflect AT&T's plans to perform an increasing amount its own billing and collecting functions. The new procedures segregate Revenue Accounting Expenses into three subcategories: Message Processing Expense, Carrier Access Charge Billing and Collecting Expense, and Other Billing and Collecting Expense. Message Processing Expense and Carrier Access Charge Billing and Collecting Expense are allocated essentially in the same manner as under the former Part 67 rules. Message Processing Expense is divided in two subcategories: (1) Toll Ticket Processing Expense, which is allocated on the basis of relative toll messages; and, (2) Local Message Processing Expense, which is directly assigned to the state jurisdiction. Carrier Access Charge Billing and Collecting Expense is allocated one-half to the interstate jurisdiction if access charges other than end user charges are assessed in the state; if no such access charges are assessed, all of this expense is assigned to the interstate jurisdiction. Other Billing and Collecting Expense[30] is allocated on the basis of a formula that reflects a count of the number of users of various local and toll services.[31] This allocation factor is further adjusted to reflect the change, since 1984, in the percentage of users for which the LECs handle interstate billing and collecting.[32] Finally, the rules establish a maximum 33 percent and a minimum 5 percent interstate allocation for the Other Billing and Collecting Expense subcategory.[33]

2. Positions of Parties

19. Several parties seek reconsideration of the revised separations rules for Revenue Accounting Expenses.[34] USTA, OPASTCO, and the LECs contend that we should reconsider our decision to adopt the new procedures because the procedures are unworkable and unnecessarily complicated and because the record does not contain any information regarding the potential jurisdictional revenue requirement impact of those procedures. GTE, SNET, and Southwestern add that the new procedures will lead to unexpected and unintended results,[35] are not supported by the record, have not been fully evaluated, and will impose added administrative burdens. The LECs also object to the specific procedures adopted by this Commission, arguing that the user count required by the formula applicable to Other Billing and Collecting Expense is not readily available because the LECs did not distinguish between state and interstate message toll users in their 1984 user count. Pacific argues that the use of message counts to identify interstate users is a more accurate means to reflect the loss by the LECs of AT&T billing and collecting contracts and urges that we either clarify that LECs can continue to use relative messages or reconsider our decision to require user counts. AT&T agrees with the suggestion of Pacific that the LECs be allowed to determine the interstate proportion of toll users for the current year on the basis of billed messages. This approach, AT&T states, will avoid any potential mismatch of costs and revenues by reducing

interstate assignments while at the same time eliminating the need to perform new and costly user studies. The LECs also assert that the use of the previous year in the ratio for comparison with the 1984 count will produce anomalous results because any assumption of billing and collecting will not be reflected in the year in which it occurs. As a result, United, Bell Atlantic, Southwestern, and USTA argue that the LECs will be left with an interstate billing and collecting revenue requirement that they will be unable to recover because they no longer provide the service to the ICs. Waitsfield-Fayston notes that implementation of the new procedures will be particularly burdensome for small carriers.

20. The LECs contend that the new Revenue Accounting Expenses allocation procedures frustrate the separations simplification goal by requiring the development and implementation of new studies to count interstate and state toll users. USTA, Bell Atlantic, Southwestern, and Waitsfield-Fayston assert that this simplification objective is also contravened by the requirement that carriers segregate the user count into eight service classifications, even though the allocation factor will be applied to the total amount of the expenses. Southwestern and USTA contend that the former Part 67 procedures require a count of toll and exchange users, with toll users allocated to the jurisdictions on the basis of messages. They argue that because the new procedures require that carriers count interstate toll, state toll, and exchange users separately, these procedures could result in doubling or tripling the count of users depending on the services for which the customers are billed during the study period. Pacific and OPASTCO assert that the new user count procedures will lead to unforseen jurisdictional revenue requirement shifts and will impose costly burdens on the LECs.

21. USTA, GTE, OPASTCO, Pacific, Waitsfield-Fayston, Bell Atlantic, Southwestern, and SNET also object to the maximum and minimum interstate allocations established by the new rules.[36] These parties maintain that a maximum interstate allocation could result in the allocation of expenses to the state jurisdiction that should be allocated to the interstate jurisdiction. USTA and Waitsfield-Fayston argue that if the current ratio of interstate users to total users is greater than 33 percent, the application of the new formula will produce a factor that is less than the current factor. USTA further states that if instead the current ratio of interstate users to total users is less than 33 percent, the application of the formula will produce a factor that is greater than the current ratio. SNET submits, for example that, using the former Part 67 allocation procedures, it has an interstate allocation of 17.2 percent, but that under the new procedures, it will be required to allocate 33 percent of its expenses to the interstate jurisdiction. These parties further contend that if the base period and the current period factors are equal, the application of the formula produces an allocation of 33 percent, even though neither the current ratio nor the past ratio equals 33 percent. For example, USTA submits that if in both 1984 and 1987 a LEC has a 20 percent ratio of interstate users, that LEC will allocate 33 percent to the interstate jurisdiction in 1988.[37] These parties argue that these irrational allocations will have no relationship to the actual level of the billing and collecting performed by the LEC for the ICs. Waitsfield-Fayston argues that the maximum and minimum allocations are irrational because the LECs are required to count interstate and state toll users but must negate the results of the studies if they fail to fall within a predetermined range.

22. Bell Atlantic and DC argue that no basis exists for limitation of the interstate assignment of the Chesapeake and Potomac Telephone Company (C&P) to 33 percent because that carrier provides no state toll in the District of Columbia. DC suggests instead a maximum assignment to the interstate jurisdiction of 50 percent to reflect the two services for which C&P bills: interstate toll and local. DC also suggests that the ratio of the number of interstate users for the study year to the number of interstate users in 1984 be multiplied by 50 percent. DC's proposal is opposed by NYNEX, USTA, and Pacific, which object to any maximum interstate allocation as arbitrary because it could potentially result in a shift in revenue requirement to the state jurisdiction.

23. USTA, Waitsfield-Fayston, and Southwestern argue that the establishment of a 5 percent minimum allocation to reflect billing for subscriber line charges may substantially increase assignment of the Revenue Accounting Expenses to the carrier common line element or to other rate elements, depending on the element to which the 5 percent minimum costs are assigned. USTA and Southwestern object to the merging of the costs associated with subscriber line charge billing and collecting and the costs associated with other billing and collecting. Southwestern argues that this will produce unexpected results in the assignment of subscriber line charge costs to the carrier common line element and other billing and collecting costs to the billing and collection category. USTA and Waitsfield-Fayston further argue that carriers may not be able to recover the amounts above this 5 percent minimum that will be assigned to the billing and collection category under Part 69 because the amounts they can recover under this category are now fixed by contract. Southwestern contends that these costs must be recovered through some rate element other than billing and collection because a carrier that has only the minimum 5 percent interstate allocation is not rendering interstate billing and collecting services through which the costs could be recouped. Southwestern therefore maintains that the new procedures could have a substantial and unidentified impact on the costs assigned to other interstate rate elements. SNET requests that we allow it to recover the overassignment to the interstate jurisdiction from regulated, tariffed services.

24. Several parties suggest that we reinstate the former Part 67 procedures for Other Billing and Collecting Expense.[38] Southwestern, Waitsfield-Fayston, and Bay Springs urge that we initiate a further proceeding to address the appropriate procedures for Revenue Accounting Expenses.[39] United proposes that we reinstate the former Part 67 procedures, but include a 33 percent maximum and a 5 percent minimum interstate allocation. AT&T acknowledges some of the concerns of the LECs as valid and suggests that the new rules be rendered workable by instituting a maximum 5 percent interstate allocation of Other Billing and Collecting Expense to represent the billing of subscriber line charges. USTA responds that AT&T's suggestion of a different, but still arbitrary, cap on the interstate assignment of Other Billing and Collecting Expense has no relationship to cost-causation principles and does not remedy the allocation problems raised by various parties.

25. Bay Springs objects to the procedures adopted for Carrier Access Charges Billing and Collecting Expense, stating that this subcategory should be allocated on the basis of relative messages. It further argues that relative messages are simpler to administer and are more closely related to its actual cost of preparing an access charge bill than the arbitrary division of those costs between the jurisdictions in the new procedures, which allocates either all or one-half this expense to the interstate jurisdiction, depending on whether the carrier assesses state access charges. If we do not change the allocation procedures for Carrier Access Charge Billing and Collecting Expense, Bay Springs requests a waiver of the new Part 36 procedures to allow it to allocate this expense on the basis of relative messages.

26. Southwestern objects to the procedures for Local Message Processing Expense, arguing that the former Part 67 procedures may be more appropriate than the new procedures. Under the former Part 67 procedures, carriers used accounting records to directly assign certain costs to the Local Message Processing Expense subcategory. Under the new Part 36 procedures, carriers first combine toll and local message processing and then divide the two on the basis of relative messages between toll and local, with local expenses directly assigned to the state jurisdiction. Southwestern asserts that the new procedures are less accurate and actually increase, rather than reduce, administrative burdens.

3. Discussion

27. *Other Billing and Collecting Expense*. The considerations that originally led us to revise the Revenue Accounting Expenses allocation procedures remain valid. The Other Billing and Collecting Expense subcategory involves a large group of relatively fixed costs that are not sensitive to the volume of messages or the amount of revenue the LECs collect.[40] Thus, we properly rejected approaches that would have allocated these expenses on the basis of revenues or messages. Although these costs are fixed, only a specific and decreasing portion of the expenses in this category are related to interstate services. We continue to believe that the reduction in the amount of billing and collecting the LECs perform on behalf of the ICs should be reflected in reduced interstate assignments.[41]

28. The specific new procedures we adopted, however, have proven problematic in application. The formula adopted by this Commission for the allocation of the Other Billing and Collecting Expense subcategory requires the development of a ratio of interstate users to total users and compares that ratio for 1984 and the study year, which is the previous calendar year. This formula has caused unintended and anomalous results, such as the examples given above.[42] The Docket 80-286 Joint Board and this Commission expected that the new procedures would result in reduced interstate assignments to reflect the reduction in the amount of interstate billing and collecting services performed by the LECs.[43] The record indicates, however, that implementation of these procedures will result in increased interstate assignments, at least in some cases. Moreover, this formula has proven difficult to administer as evidenced by the waiver requests regarding the count of users.[44] Our formula was intended to reflect the difference between the amount of billing and collecting performed by the LECs when they did all of AT&T's billing and collecting and the amount that they will perform after AT&T has assumed performing some of its own billing and collecting functions. Because the amount of the billing and collecting services AT&T has begun performing has been less than we originally expected, our formula may no longer be an accurate measure.

29. We therefore invite interested persons to submit proposals for a permanent formula that will be more consistent with our objectives. We are asking the Docket 80-286 Joint Board to analyze those proposals and to submit a recommendation. Pending resolution of that inquiry, we reinstate the former Part 67 procedures for the Other Billing and Collecting subcategory on an interim basis beginning January 1, 1989.[45]

30. *Message Processing Expense*. Southwestern argues that the new procedures for Message Processing Expense, which first aggregate local and toll messages and then segregate local and toll on the basis of messages with local messages directly assigned to the state jurisdiction, are less accurate and more burdensome than the former Part 67 procedures, which directly assigned local messages at the outset. We are not persuaded that Southwestern's suggestion would produce more accurate or equitable results.

31. *Carrier Access Charge Billing and Collecting Expense*. Bay Springs argues that we should allocate Carrier Access Billing and Collecting Expense on the basis of relative messages because it believes that such an approach reflects its actual costs in performing such billing and collecting better than the adopted procedures which allocate either all or one-half of this expense to the interstate jurisdiction depending on whether the carrier assesses state access charges. We do not find Bay Springs arguments persuasive. We accordingly deny Bay Springs' waiver request.

32. *Other issues*. Several parties raise issues regarding the Part 69 recovery of Revenue Accounting Expenses. To the extent these parties argue that they cannot recover the amounts allocated to the Part 69 Billing and Collecting category because the rates for that service are fixed by contract, we note that these parties were aware of pending separations revisions and therefore could have negotiated adjustment clauses in their contracts.[46] Moreover, because interstate billing and collecting is a detariffed service,[47] the LECs are not required to base their rates for this service on costs. We therefore decline to revise the Part 36 rules based on these arguments.

4. Comments Invited

33. Accordingly, we invite further comment on the separations procedures applicable to Revenue Accounting Expenses and refer this issue to the Docket 80-286 Joint Board for a recommendation of a permanent solution. We request that parties address the extent to which proposed procedures: (1) reflect cost-causation principles; (2) affect the division of revenue requirements between the jurisdictions; and, (3) are burdensome to implement and administer. We request that parties also address any issues they believe may be of value in resolving this issue. We request that any comments filed be as specific as possible, proposing specific rule amendments, and that the factual basis for any conclusions reached be clearly stated.

5. Data Request

34. In conjunction with the proposal discussed above, we request that parties submit data, as specified in Appendix B, to aid the evaluation proposals by the Docket

80-286 Joint Board and this Commission. The data request solicits information regarding the carriers' Part 31 and Part 32 accounts for Revenue Accounting Expenses, including separated expenses. The data request seeks information regarding the overheads, taxes, and return associated with these expenses and regarding the number of toll messages and users. The data request also solicits information regarding the expenses that were charged to Account 662 under Part 31 accounting and are charged to accounts other than Account 6620 and Account 6623 under Part 32 accounting. Because we are seeking information for both Part 31 and Part 32 accounting, we request both 1987 and 1988 data.

C. Lifeline Connection Assistance Expense

1. Background

35. Under the new Separations Manual, carriers are required to calculate the expenses incurred in providing Lifeline Connection Assistance to subscribers. That amount is then assigned on a *pro rata* basis among several account categories.[48] The manual directs that based on these *pro rata* calculations, the carriers decrease state costs for these account categories and, correspondingly, increase interstate costs for these account categories.

2. Positions of Parties

36. USTA, Ameritech, Bell Atlantic, BellSouth, NYNEX, Southwestern, and GTE object to the *pro rata* distribution of Lifeline Connection Assistance Expense, asserting that this procedure is unnecessarily burdensome and complex, given the relatively small amounts of these expenses. They propose instead that we adopt an assignment of Lifeline Connection Assistance Expense which would require carriers to adjust total state and interstate expenses and which would be similar to the procedures for the USF.[49] They argue that such an adjustment would be a simpler, less burdensome procedure for the LECs. GTE adds that such an adjustment will not change the intent or the impact of the Lifeline Connection Assistance program. No party opposes this change. NYNEX proposes, in the alternative, that these expenses be recorded in Account 7100, Other Operating Income and Expenses. NYNEX asserts that this alternative approach will ensure that these expenses are readily identifiable and would provide a simpler, less burdensome procedure for the LECs.

3. Discussion

37. We grant the petitions of USTA and others on this issue and revise our Rules to provide an adjustment of the Lifeline Connection Assistance Expense that is comparable to the Universal Service Factor adjustment. We agree that the new procedure requiring the assignment of the Lifeline Connection Assistance Expense to account categories is unduly burdensome and complex and is unnecessary. Moreover, that procedure does not provide for the identification of the expenses associated with Lifeline Connection Assistance. The revised procedure will be less burdensome and complex. Moreover, the revised procedure for the Lifeline Connection Assistance Expense adjustment is consistent with the procedure for the Universal Service Factor. We are not adopting NYNEX's alternative suggestion that Lifeline Connection Assistance Expense adjustment be made to the account category associated with Account 7100, Other Operating Income and Expenses. Although the NYNEX suggestion eliminates the complexity of a *pro rata* Lifeline Connection Assistance adjustment among several account categories, it does not provide separate identification of the amount of the adjustment. Instead, it would combine the adjustment with other amounts in an account category that are unrelated to the provision of Lifeline Connection Assistance. We believe, therefore, that the USTA suggestion is preferable to the NYNEX alternative.

D. Category 3 Central Office Equipment

1. Background

38. Under the former Part 67 procedures, carriers were required to divide their investment in the former Category 6 COE, Local Dial Switching Equipment, into nontraffic-sensitive (NTS) and traffic-sensitive (TS) components.[50] The NTS component was allocated on the basis of the frozen Subscriber Plant Factor (SPF);[51] the TS component was allocated on the basis of dial equipment minutes (DEM), which included toll weighting factors (TWFs). TWFs were specific factors developed for each type of equipment and were intended to reflect the differences between local switching costs and toll switching costs that existed among the various types of switching equipment. The *Report and Order* combined the former Categories 4, 5, 6, and 7 COE into a new category, Category 3 COE, Local Switching Equipment. We decided that the investment in the category will be allocated on the basis of DEM without TWFs. We also established a series of weighting factors by which the DEM factor is weighted up to three times for carriers with 50,000 or fewer access lines. In addition, we are phasing-in the implementation of the DEM factor over a five-year period which began January 1, 1988.[52]

2. Positions of Parties

39. NASUCA and the Independent Alliance seek reconsideration of the new Category 3 COE procedures. BellSouth, Southwestern, Bell Atlantic, NYNEX, and USTA oppose the NASUCA and Independence Alliance petitions on this subject. NASUCA and the Independent Alliance assert that we should adopt an allocation factor for Category 3 COE that is not based on usage because the investment in the category is predominantly NTS and because the Docket 80-286 Joint Board and this Commission failed to justify a usage-related factor. NASUCA argues that the apportionment of NTS plant on the basis of usage is inherently arbitrary, contravenes our decisions regarding the allocation of loop plant, and violates cost-causation principles. Southwestern responds that NASUCA's petition is entirely premised on irrelevant or misunderstood facts and disputes NASUCA's conclusion that the procedures by which NTS loop costs are recovered can be compared to the TS COE cost allocation rules. Southwestern also argues that NASUCA incorrectly assumes that 75 percent of digital switches are NTS. Southwestern maintains that such switches are virtually 100 percent TS. NASUCA suggests that we allocate NTS investment equally to exchange and toll services but also proposes the application of a flat 25 percent interstate allocation factor. The Independent Alliance suggests the use of an NTS factor, such as a 25 percent gross allocation factor. BellSouth responds that the record in Docket No. 80-286 overwhelmingly supported the conclusion that the

application of SPF to allocate the NTS portion of the local switching costs had caused substantial distortions in allocations. Moreover, BellSouth asserts that these petitioners fail to demonstrate that a relative use allocation factor would be inappropriate.

40. NASUCA also argues that no basis exists for the decision to eliminate the NTS/TS distinction, contending that distinguishing between NTS and TS components is not as difficult as the Docket 80-286 Joint Board and this Commission had assumed. BellSouth responds that the record in Docket 80-286 established that technological changes, such as the use of chip circuitry and line card equipment in digital switches, have rendered the NTS/TS distinction arbitrary and less reflective of cost-causation principles. BellSouth also argues that administrative difficulties and costs are associated with the performance of the detailed studies necessary to distinguish between NTS and TS components. NASUCA contends that the abandonment of the NTS classification will impose an inequitable burden on basic exchange ratepayers.

41. NASUCA also objects to the elimination of TWFs, arguing that such factors remain justified because they represent the continued disparity between local switching costs and toll switching costs. NASUCA maintains that, contrary to the statements of the Docket 80-286 Joint Board, differences will continue to exist between the switching costs for intraoffice and interoffice traffic, even after the installation of digital equipment. NASUCA asserts that the cost studies used by LECs to justify local measured service contradict their arguments that no differences exist between the costs of intraoffice and interoffice traffic. NASUCA claims that local service cost studies indicate that interoffice calls have greater switching costs. Southwestern responds that these local service cost studies are consistent with the application of measured DEM, which assigns to the interstate jurisdiction a minute-of-use for each switch used in routing one minute interstate call. Southwestern also disagrees with NASUCA's reliance on switching data that is almost twenty-years-old to support the continuation of toll weighting. BellSouth states that the Docket 80-286 Joint Board and this Commission correctly concluded that digital switching has greatly reduced, if not eliminated, the additional cost of toll switching. Moreover, BellSouth asserts that due to the rapidly changing technological environment, maintenance of accurate and current TWFs is difficult. In addition, BellSouth notes that the TWF studies were based on the investment amounts determined by the NTS/TS division of the switch, a distinction that the record has shown is arbitrary. Bell Atlantic states that TWFs have become outdated with the introduction of new technology. Moreover, Bell Atlantic asserts that the artificial distinction between toll and local traffic has caused irrational choices in the ICs' subscription to interstate access services.

42. The Independent Alliance also objects to the small carrier assistance plan we adopted as part of the Category 3 COE procedures. It argues that we should replace this plan with a high cost assistance mechanism to better address the problem of upward pressure on local rates. The Independent Alliance contends that, according to the data filed in the Docket No. 80-286 proceeding, the small carrier assistance plan has no relationship to a carrier's actual need for assistance and therefore is arbitrary and contravenes cost-causation principles. The Independent Alliance proposes that the assistance mechanism be targeted for truly high cost companies and that it be limited to exclude the BOCs. Bell Atlantic opposes this suggestion, arguing that this approach was appropriately rejected by both the Docket 80-286 Joint Board and this Commission and that any adverse revenue requirement impacts of the new procedures will be adequately addressed for all carriers by the five-year phase-in of the new procedures.

43. The Independent Alliance further argues that the combination of the former Categories 4 and 5 COE with the former Category 6 COE ignores the significantly different uses of the equipment in these categories and results in the allocation of costs on the basis of factors that are totally unrelated to the actual use of the plant. Moreover, the Independent Alliance asserts that the new procedures result in the allocation of the investment in the former Categories 4 and 5 COE to local service, although that service does not require the use of this equipment. It proposes that the former Categories 4 and 5 COE be reinstated and that the investment in these categories be allocated on the basis of toll traffic. The Independent Alliance concludes that the separations process has been simplified at the expense of cost-causation principles. Moreover, it argues that the new procedures will not reduce the carrier's administrative costs and will replace procedures that were not overly burdensome or complex. BellSouth responds that the record shows that the investment in the former Categories 2, 3, 4, 5, and 7 COE represents a small portion of total COE investment. Moreover, BellSouth and NYNEX assert that the record demonstrates that any benefit in separations results obtained by disaggregating these categories fails to justify the administrative costs associated with maintenance of these categories. USTA, Bell Atlantic, and NYNEX oppose reconsideration of the Category 3 COE procedures, arguing that the collapse of the categories has simplied the separations process and reduced administrative burdens for carriers.

44. NECA requests clarification of the application of the new procedures. Specifically, NECA requests that we clarify that the five-year phase-in is applicable to the carriers eligible for the small carrier assistance.

3. Discussion

45. We deny petitions to reconsider our decision to adopt new procedures for the categorization and allocation of Category 3 COE. The new procedures represent a careful balance of the goals of the Docket No. 80-286 proceeding. Thus, we believe that, compared to the former Part 67 procedures, the new procedures better reflect cost-causation principles, simplify the separations process, and reduce the administrative burdens for carriers.

46. *NTS/TS Distinction*. The Independent Alliance and NASUCA argue that the distinction between NTS and TS local switching costs remains valid and that local switching costs should not be allocated on the basis of a relative use allocation factor. Their belief that a relative use allocation factor such as DEM does not reasonably reflect cost-causation principles when applied to local switching equipment is based solely on their assertion that local switching costs are predominantly NTS. To support this claim, however, NASUCA relies on almost twenty-year-old switching data which does not reflect current technology. The Independent Alliance simply asserts that the Docket 80-286 Joint Board concluded in its *COE Recommended Decision and Order* that local switching equipment is primarily NTS. This assertion is incorrect. That Joint Board's statement that "under the existing rules

a larger percentage of a digital switch is considered NTS" is only a description of the effect of the former Part 67 rules.[53] The Docket 80-286 Joint Board did not describe current switching costs as predominantly TS or NTS. On the contrary, as that Joint Board stated, although the NTS/TS distinction may be valid for older switches, it has become difficult to calculate and justify due to changing technology and the introduction of modern digital switches.[54] We believe the LECs' difficulty in distinguishing between NTS and TS costs was well-demonstrated in the record.

47. NASUCA submits two arguments in support of its claim that switching costs are predominantly NTS. It argues that, because digital switches are designed to be virtually nonblocking, the costs of such switches are determined essentially by the number of access lines served and are largely unaffected by switch usage. This argument falsely assumes, however, that digital switches are nonblocking. To enable a small number of components to serve a large number of lines, concentrators are designed into the various components of a digital switch. Such concentration takes advantage of the fact that most lines are unused most of the time. Because an increase in the usage volume per line reduces the concentration level and thus increases the number of switch components required, and because most of the digital switch components are affected by concentration, the costs of modern digital switches are actually predominantly TS.[55] For this reason, and because the old electromechanical switches are being rapidly replaced by digital switches,[56] we believe a large and significantly growing portion of the industry's total switching costs is already TS. Moreover, we agree with the conclusion of the Docket 80-286 Joint Board that a two-tiered approach, under which the NTS/TS distinction is retained for older equipment but is eliminated for newer equipment, would unduly complicate the separations process and would therefore contravene our goal of simplifying separations procedures. The adoption of such an approach could also distort carrier investment decisions. NASUCA's second argument is that digital switching costs must be predominantly NTS because such costs are predominantly fixed. This argument is specious. Switches that are designed to handle a large traffic volume are larger and more costly than switches that are designed to handle a small traffic volume. Even if virtually all switching costs become fixed when the switch is installed, the decision to install a large switch rather than a small switch or to install five switches rather than four is affected by the anticipated traffic volume. Moreover, the levels of concentration designed into various stages of the switch are affected by the traffic volume anticipated by the switch manufacturer.

48. We disagree with NASUCA's claim that reintroducing the NTS/TS distinction would not be burdensome for the LECs. On the contrary, the record in Docket 80-286 showed that such a requirement would be burdensome and costly, with few attendant benefits. Specifically, the maintenance of the distinction would require costly and time consuming studies, which would have to be updated periodically. Even NASUCA agreed in its comments filed in Docket 80-286 that the most recent studies were inaccurate because they were developed almost twenty years ago. The results that would be achieved by updating these studies would not justify the expenditure of the large amount of resources that would be required.

49. *Allocation Factor*. We conclude that the allocation factor should be based on relative usage. We believe that the Docket 80-286 Joint Board properly rejected alternative allocation procedures such as SPF and the flat allocation factor suggested by NASUCA and the Independent Alliance.[57] Because digital equipment is comprised mainly of TS components, neither SPF nor a flat allocation factor would reflect cost-causation principles for that equipment, because those methods would fail to allocate the costs associated with modern digital switching equipment in proper proportion to the state and interstate usage of the equipment. Thus, application of SPF or a flat allocation factor would cause substantial distortions in the allocation of this investment. We believe that, contrary to the claims of the Independent Alliance and NASUCA, our decision to allocate NTS loop plant costs through a flat allocation factor does not justify the adoption of an NTS allocation factor for switching costs, which are predominantly TS for an increasingly large proportion of the equipment. An allocation factor based on relative usage is consistent not only with cost-causation principles but also with the treatment of local switching costs in the access charge rules.[58] We therefore affirm our decision to adopt DEM as the allocation factor for Category 3 COE. We note, however, that the Docket 80-286 Joint Board is conducting further inquiry into this issue and will recommend whether we should retain DEM or adopt another relative use measure.[59]

50. *Toll Weighting Factors*. For similar reasons, we will not reconsider our decision to eliminate TWFs. We recognize that, when electromechanical switches were used extensively, TWFs appropriately reflected the high trunk costs associated with the switching of toll calls. NASUCA is mistaken in asserting, however, that this situation prevails for the modern analog and digital electronic switches. The need for such trunks, which served to connect the old switches to carrier systems, has been rapidly disappearing along with electromechanical switches. Carrier systems connect directly to modern switches, thereby eliminating the need for stand-alone trunk. Moreover, the cost data submitted by NASUCA are not sufficient to support its claim that toll switching costs exceed nontoll switching costs for messages of equal duration. Those data do not compare toll and nontoll costs but, rather, intraoffice and interoffice costs. Because most of the industry's interoffice minutes-of-use consist of exchange calls, not toll calls, the average cost of interoffice calls is not an appropriate indication of the average cost of toll calls. Moreover, NASUCA does not describe the assumptions on which the cost study was based or submit the data from which it was derived. For example, NASUCA fails to explain how message data that are described as "untimed" are nonetheless known to be "of equal call duration." The use of TWFs would require numerous costly studies to maintain their accuracy, given the rapid changes in switching technology. We therefore affirm our decision to eliminate TWFs for Category 3 COE.

51. *Combination of COE Categories*. We also decline to reconsider our decision to combine the former Categories 4, 5, 6, and 7 COE into the new Category 3 COE. Given current technology, the distinction between Categories 4, 5, 6, and 7 COE is inherently arbitrary because no accurate method exists to identify these costs. In addition, the record in Docket No. 80-286 demonstrated that the investment in the former Categories 4, 5, and 7 COE represent less than 3 percent of the total investment in

COE.[80] We therefore conclude that the administrative burden that would be imposed on carriers by requiring that they separately identify this investment would not be justified by any increased accuracy in separations results. Moreover, combining these categories with the former Category 6 COE furthers our goal of simplification. We disagree with the Independent Alliance's conclusion that no costs in the former Categories 4 and 5 COE should be attributed to local service. On the contrary, some of the equipment in these categories is used for both toll and local service. For example, the digit absorption equipment in the former Category 5 COE, Other Toll Dial Switching Equipment, is used for both local and toll service. In addition, many local service areas provide local measured service which would require the use of the former Category 4 COE, Automatic Message Recording Equipment.

52. *Small Carrier Assistance.* We also affirm our decision to adopt a small carrier assistance plan that is separate from the high cost assistance mechanism of the USF. We believe that the procedures contained in the current rules would best meet the goals of this proceeding. Moreover, we adopted a five-year phase-in of the new procedures to help carriers and their customers accommodate shifts in revenue requirements.[81] We further note that the Docket 80-286 Joint Board is currently examining the issue of the small carrier assistance in its Category 3 COE inquiry.[82] We decline to revise these procedures pending the outcome of that inquiry.

53. Finally, we grant NECA's request for clarification of the Category 3 COE procedures. Specifically, we clarify that the small carriers eligible for the weightings should implement the five-year phase-in of the new DEM allocation factor. The rule amendment that clarifies these procedures is contained in Appendix A.

E. Category 1 Central Office Equipment

1. Background

54. Based on the recommendations of the Docket 80-286 Joint Board,[83] we adopted new procedures which consolidate the former eight categories of COE into four categories.[84] We retained Category 1, COE, Operator Systems Equipment, as a separate category. The Docket 80-286 Joint Board stated that the functions associated with operator services are both easily identifiable and fundamentally different from the more integrated switching functions in the other categories of COE. Thus, under the new Separations Manual, Category 1 COE is divided into several subcategories, most of which are allocated on the basis of weighted standard work seconds.[85] Although we adopted the Docket No. 80-286 Joint Board's recommendation that location studies be replaced by study area studies for COE, we did not eliminate location studies for Category 1 COE.

2. Positions of Parties

55. BellSouth proposes that we eliminate the weighting of the work seconds in the allocation factor for Category 1 COE, arguing that such an approach would simplify the separations process. It also proposes that the studies performed for Category 1 COE be required on a study-area basis rather than on a location basis, consistent with the changes for the other COE categories adopted by this Commission. SNET submits that the current procedures for Category 1 COE are overly burdensome and could be revised without creating any jurisdictional shift in revenue requirements. SNET proposes that the procedures be simplified and that all Operator Systems Equipment be combined in one category which would be allocated on the basis of unweighted work seconds. This approach, SNET argues, would be consistent with the procedures applicable to Operator Services Expenses. Southwestern responds that although a simplified Category 1 COE is desirable, the Docket 80-286 Joint Board should consider the issue of Category 1 COE procedures in the context of the proceedings examining Categories 3 and 4 COE, so that the revenue requirement impact of any changes could be fully evaluated.[86]

3. Discussion

56. We decline to revise Category 1 COE procedures at this time. In the Docket No. 80-286 proceeding, we have revised the separations rules only after developing a full record. Neither the Joint Board in Docket No. 80-286 nor this Commission has sought comment on Category 1 COE procedures and, therefore, we have not developed a record on this issue. Moreover, we believe the change from weighted standard work seconds to unweighted standard work seconds could have a significant revenue requirement impact. For these reasons, we will not reconsider our decision to retain the former Part 67 procedures for Category 1 COE.

F. Use of the Class B Separations Manual by Class A Carriers

1. Background

57. The goals of the Docket 86-297 Joint Board were to both conform the Separations Manual to the revised USOA and simplify the separations procedures applicable to both large and small carriers with minimal revenue requirement impacts. [87] In its *Conformance Order Inviting Comments*, that Joint Board tentatively proposed two Separations Manuals to reflect the two-tiered accounting structure of the revised USOA. Under that proposal, Class A carriers would use the complex Class A Manual and Class B carriers would use the simplified Class B Manual. The Docket 86-297 Joint Board requested comment on whether, and under what conditions, Class A carriers should be allowed to use the Class B Manual. In addition, that Joint Board requested suggestions for other proposals to simplify the separations procedures used by both large and small carriers. In the *Conformance Recommended Decision and Order*, the Docket 86-297 Joint Board found that these goals could be met through the adoption of one manual for use by all carriers. In adopting that Joint Board's recommendation, we also adopted its reasoning as our own.[88]

2. Positions of Parties

58. DC seeks reconsideration of our decision to require the use of one manual for all carriers. It argues that Class A carriers should not be allowed to use the Class B Manual because use of the Class B Manual produces an unfair revenue requirement impact. It alleges that implementation of the Class B Manual in its jurisdiction could shift up to 10 million, or 6.17 percent, in revenue requirement to the state jurisdiction. DC maintains that the goal of simplification should not be achieved at the expense of precision in accounting and should not be

implemented because of unacceptable shifts in revenue requirements. USTA asserts that the use of the Class B Manual by all carriers will not result in the loss of any separations detail, noting that the National Association of Regulatory Utility Commissioners (NARUC) supported the adoption of one manual. Moreover, USTA submits that the adoption of one manual will not result in unacceptable shifts in revenue requirement for the industry as a whole. Southwestern and NYNEX also oppose DC's petition.

3. Discussion

59. We affirm our decision to adopt one manual for the use of both large and small carriers. The majority of the parties in Docket No. 86-297 supported the use of a single manual. These parties included all the Bell Operating Companies, large and small independents LECs, USTA, and NARUC. We agreed with these parties' arguments that a modified Class B Manual should be adopted for all carriers because it would provide separations simplification with no apparent change in the accuracy of the allocation of costs and because it would reduce the carriers' administrative costs. We believed that these reduced costs would in turn reduce the carriers' overall revenue requirements. As the Docket 86-297 Joint Board stated, the burdensome requirements and great costs of more complex separations procedures are not justified by any increased accuracy in jurisdictional results and would produce merely the illusion of precision.[69] We believe that the benefits of simplifying separations procedures apply equally to both large and small carriers. We also believe that the use of one manual by all carriers will promote uniformity and reduce inconsistent separations results and inconsistent access charges.

60. DC has presented no persuasive reasons to reconsider our decision. It is concerned about the revenue requirement impact of the use of the Class B Manual by the Class A carrier serving its jurisdiction. In its *Conformance Recommended Decision and Order*, [70] the Docket 86-297 Joint Board carefully considered the arguments of parties, including DC, that favored the use of two manuals. That Joint Board recommended some modifications of the original version of a Class B manual to address those concerns. Those modifications will allow us to achieve the goals of simplification and conformance without significant revenue requirement impacts for the nation as whole. We recognize that certain study areas may experience more significant impacts than the nationwide average,[71] but we decline to require as a remedy that Class A carriers, which account for approximately 90 percent of the industry's total revenue requirement, use burdensome and complex procedures which would produce merely the illusion of precision in jurisdictional allocations. We believe that the Class B Manual, as modified, will best achieve a balance between the goal of simplification and the need to reasonably reflect cost-causation principles. Moreover, acting on the recommendation of the Joint Board in Docket No. 86-297, we included in the monitoring program in Docket No. 80-286 an evaluation of the jurisdictional revenue requirement impact of the new manual.[72] This program should serve to identify unanticipated revenue requirement shifts. We believe that DC's arguments were well-considered in this proceeding and that it presents no additional arguments warranting reconsideration.

G. Allocation of General Support Facilities

1. Background

61. The *Report and Order* [73] adopted the recommendation of the Docket 86-297 Joint Board[74] that we implement a bifurcated allocation procedure for General Support Facilities.[75] Under the new procedures, the Class A carriers allocate the costs in this category on the basis of the allocation of the combined Big Three Expenses, which includes Plant Specific Expenses, Plant Nonspecific Expenses, and Customer Operations Expenses. The Class B carriers allocate the costs of General Support Facilities on the basis of the allocation of the combined investment in three types of plant: COE, Information Origination/Termination Equipment, and Cable and Wire Facilities.[76] The Docket 86-297 Joint Board found that the use of the expense-related factor by all carriers would result in a shift of 72 million in revenue requirement to the interstate jurisdiction but would also produce an increase in state revenue requirements for some small carriers. That Joint Board determined that an approach that would require all carriers to use the plant-related factor would result in a shift in revenue requirement to the interstate jurisdiction of 227 million but would eliminate the increase in state revenue requirements for the majority of the smaller carriers. It also determined that the use of the bifurcated approach would result in a shift in revenue requirement to the interstate jurisdiction of only 64 million.[77]

2. Positions of Parties

62. DC suggests that we reconsider our decision to adopt a bifurcated allocation procedure for General Support Facilities, arguing that 5.4 million of the 10 million in revenue requirement that it predicts will be shifted to the DC jurisdiction as a result of the Class B Manual could be eliminated by allowing the Class A carriers to use the plant-related factor. DC proposes that we investigate this approach. BellSouth responds that, although the impact of the bifurcated procedure varies in each jurisdiction, the overall public interest is served by the effort of the Docket 86-297 Joint Board to minimize the nationwide jurisdictional shift. USTA opposes DC's petition, stating that the Joint Board recommendation properly reflects both an effort to reduce overall revenue requirement impacts and the different plant characteristics and structures of large and small carriers.

3. Discussion

63. We affirm our decision to adopt bifurcated procedures for the allocation of General Support Facilities. The adoption of one set of allocation procedures for General Support Facilities for use by all carriers would result in significant revenue requirement shifts, as indicated above. The data submitted in Docket No. 86-297 indicated that, although the use of the expense-related factor would result in smaller revenue requirement shifts for the majority of the Class A carriers as a whole when compared to the plant-related factor, the use of the plant-related factor would result in substantially smaller shifts for the Class B carriers as a whole. This result is attributable to the different plant characteristics and structures of large and small carriers. The data submitted in this proceeding indicate that adoption of a bifurcated approach will substantially mitigate the revenue requirement shifts of the new manual. Thus, the bifurcated approach strikes the appro-

priate balance between the need to adopt procedures that reflect cost-causation principles and the concern for the revenue requirement impact of those procedures.[78]

H. Universal Service Fund

1. Background

64. The rules applicable to the USF provide a mechanism for carriers to file updates of costs per loop with NECA.[79] The rules also require NECA to recalculate the national average, unseparated loop cost per working loop to reflect the optional updated filings from carriers.[80] The USF procedures do not, however, provide a mechanism for NECA to collect any additional monies from the ICs which support the USF. Therefore, these additional monies are recovered from the current common line pool, thereby reducing the carriers' overall rate of return which is based on the pool.

2. Positions of Parties

65. NECA proposes that we modify the USF rules to provide for annual resizing of the fund. NECA argues that the revenues necessary to support the USF and any updates or adjustments to it are currently provided through carrier common line charges. It asserts that any additional monies required by the LECs to cover increases in the fund resulting from updates or other adjustments would detract from the LECs' ability to earn their authorized rate of return. NECA contends that the need to resize the USF will become even more significant when the USF is recovered from the ICs through flat charges beginning April 1, 1989. NECA asserts that once the direct billing of a flat rate is implemented, the LECs' ability to recover on a timely basis the monies necessary to support the USF will be essential to NECA's successful administration of the fund. No party opposes NECA's petition.

3. Discussion

66. We grant NECA's petition regarding the USF and will allow NECA to resize the USF beginning April 1, 1989. Adjustments to the common line cost pool and associated tariffs may not be justified under the current recovery procedures for the USF, under which the LECs bill the ICs and pool these monies through NECA. Because the adjustments to the pool would be relatively insignificant, NECA may not find a mid-course tariff correction to recover the additional costs appropriate. Beginning April 1, 1989, however, when common line pooling is no longer mandatory, NECA will be required to bill the ICs directly for the USF. Therefore, after that date, NECA should be able to adjust the charges to the ICs to reflect any updates in the USF costs filed by carriers. This approach will assure that NECA will have adequate funds to pay its high cost obligations. This annual resizing would also make the USF a more accurate reflection of actual costs and would be consistent with the procedures for Lifeline Connection Assistance. We therefore will allow resizing of the USF beginning April 1, 1989.

I. Legal Issues

1. Positions of the Parties

67. Three parties argue that the process by which we adopted the new Separations Manual violates the Administrative Procedure Act (APA). DC argues that the adoption of one Separations Manual for use by both large and small carriers violates Section 553(b)(3) of the APA.[81] DC claims that this Commission and the Docket 86-297 Joint Board failed to provide the public with notice of the intention to adopt the Class B Manual for use by Class A carriers and, therefore, the final rules depart materially from the proposed rules. Moreover, DC states that the decision to modify the originally proposed Class B Manual also violates the APA. Specifically, DC objects to the bifurcated allocation procedure for General Support Facilities. DC contends that another round of public comment is necessary. DC further asserts that revisions to the manual were the product of closed discussions among the Docket 86-297 Joint Board and members of the industry. California suggests that this Commission seek further comment on the impact of the new manual in those cases in which the parties have not had a prior opportunity to comment.

68. Bay Springs and Waitsfield-Fayston object to the process by which we adopted new separations procedures for Revenue Accounting Expenses. Bay Springs argues that because the Docket 80-286 Joint Board and this Commission failed to consider its suggestion that the Carrier Access Charge Billing and Collection Expense subcategory be allocated on the basis of messages, this Commission's decision violates the APA. Waitsfield-Fayston argues that this Commission acted arbitrarily and capriciously, in violation of the APA, when we adopted the recommendation of the Docket 80-286 Joint Board regarding Revenue Accounting Expenses because the rules we adopted were never specifically proposed for comment. Waitsfield-Fayston maintains that if that Joint Board had proposed the final rules for comment, the record would have shown that the adopted approach was unworkable and unnecessarily complex. It also contends that the Docket 80-286 Joint Board and this Commission failed to set forth the reasons for changing the originally proposed procedures and failed to specify those comments or data that were the basis of these changes.

69. Southwestern, BellSouth, NYNEX, and USTA oppose these legal challenges to the *Report and Order*, arguing that this Commission and the Docket 86-297 Joint Board provided adequate notice of the procedures adopted in the new manual. Southwestern states that the *Conformance Order Inviting Comments* did not suggest that the simplified rules would be adopted only for small carriers. Southwestern, BellSouth, and USTA contend that, under the applicable case law, the standards of the APA were met in the instant case. NYNEX argues that the rejection of the proposals submitted by DC does not constitute inadequate notice and that DC was given an equal opportunity to file comments. NYNEX further argues that the Docket 86-297 Joint Board properly based its recommendations on an analysis of the comments and data.

2. Discussion

70. We conclude that this Commission provided sufficient notice to satisfy APA requirements and that the Joint Boards followed appropriate procedures which afforded all interested persons an adequate opportunity to comment. Section 553(b)(3) of the APA requires that a notice to the public provide, "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[82] The standard for determining whether an agency has complied with Section 553 is "whether the notice given was sufficient to fairly apprise

interested parties of all significant subjects and issues involved."[83] We chose to describe the subjects and issues in general terms when we adopted the *Conformance NPRM* in order to provide the Docket 86-297 Joint Board with a broad mandate to consider and recommend comprehensive changes in separations rules and procedures. That approach is permissible under the APA and was appropriate in view of the nature of the separations process[84] and the impact that a comprehensive revision of the USOA necessarily has upon the separations process. That Joint Board's mandate was not limited to separations changes that are absolutely necessary to conform the Separations Manual to the new USOA. The *Conformance NPRM* said:[85]

> Because we are seeking recommended revisions to the entire Separations Manual by convening a Joint Board, we have decided that this proceeding should not be limited to the minimal changes that will be necessary to conform the Separations Manual with the new USOA and other changes that will have occurred by 1988. We are also asking this Joint Board to recommend additional modifications that should make it easier for carriers to comply with the separations process.

71. DC does not appear to be claiming that the *Conformance NPRM* was insufficient. DC implies that the subsequent *Conformance Order Inviting Comments* issued by the Docket 86-297 Joint Board was misleading. The *Conformance Order Inviting Comments* did invite comments upon two possible revised manuals, a Class A Manual for Class A telephone companies that would make the minimum changes necessary to conform the Manual to the new accounting procedures for Class A telephone companies and a Class B Manual that would have made much more comprehensive changes in order to simplify separations procedures for the Class B telephone companies.[86] The Joint Board ultimately recommended that a modified version of the Class B Manual be used for all companies. We believe the *Conformance Order Inviting Comments* did provide adequate notice that the Docket 86-297 Joint Board might recommend a single manual for all companies that differed significantly from the Class A Manual. That Order said:[87]

> In addition to the simplification of separations procedures proposed for the Class B Manual, we request suggestions for other proposals to simplify separations procedures for both large and small carriers. Any such proposal must be fully supported and include an estimate of any potential shift in revenue requirements. We also expect that recommendations for separations simplification be accompanied by draft separations rules. Commenters should address the issue of whether, and under what conditions, Class A carriers should be allowed to use the simplified Class B Manual.

72. The Docket 86-297 Joint Board in fact received numerous comments urging that the Class B Manual or some modified version of the Class B Manual be applied to Class A carriers. In view of all the circumstances, DC had ample notice that the Docket 86-297 Joint Board and this Commission would seriously consider and might adopt such proposals. Moreover, DC has not demonstrated that it would have presented any argument that would have persuaded us to refrain from adopting a modified Class B Manual for all carriers if that Joint Board had never tentatively proposed a Class A Manual for Class A carriers. Therefore, we reject DC's claim that we erred in adopting one manual that is designed to achieve conformance and simplification for all carriers.

73. We also reject DC's claim that we erred in adopting an allocation formula for General Support Facilities that differs somewhat from rules contained in either draft Manual in the *Conformance Order Inviting Comments*. Section 553(b)(3) of the APA has been interpreted to mean that an agency is not required to publish in advance every precise proposal it may adopt.[88] Moreover, because the public had adequate notice of the general subject of the Docket No. 86-297 proceeding and ought to have anticipated that we might modify the proposed rule in light of developments during the Rule Making process, the subsequent modification of the rule the Docket 86-297 Joint Board originally proposed does not render the proposed rule defective.[89] Contrary to the assertions of DC, the submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the adopted rule differs somewhat from the proposed rule.[90] This is particularly true when proposals are adopted in response to comments or, in this case, data from parties to the proceeding.[91] A contrary rule would lead to the absurdity that an agency could learn from comments on its proposals only at the peril of starting a new procedural round of commentary.[92] We therefore conclude that the modification of the originally proposed Class B Manual in response to the comments and data does not necessitate an additional round of comments. DC's assertion that revisions to the Separations Manual were a product of closed meetings between the Joint Board staff and the industry are unfounded. Any changes to the draft manual that the Docket 86-297 Joint Board submitted for comment were the sole product of the record in Docket No. 86-297, including comments, data, and filings properly submitted pursuant to our *ex parte* rules.

74. DC cites *National Black Media Coalition v. FCC* [93] as its primary support for the argument that we violated the notice requirements of Section 553 of the APA. *NBMC v. FCC*, however, can be distinguished from the instant case. In *NBMC v. FCC*, the National Black Media Coalition challenged our decision not to adopt nontechnical eligibility standards which would promote minority ownership of broadcasting properties. Although the NPRM in that proceeding proposed to adopt the minority preference policy, we declined to do so in our final Report and Order. The reviewing court stated that, "[w]hile a final rule need not be an exact replica of the rule proposed, the final rule must be a 'logical outgrowth' of the proposed rule."[94] The court reversed, finding the adopted rule in that case was not a logical outgrowth of the proposed rule. In the instant case, however, the adopted Separations Manual was a logical outgrowth of the *Conformance NPRM* and the *Conformance Order Inviting Comments* as well as the comments and data filed in response thereto. The adoption of one manual for use by all carriers and the adoption of bifurcated allocation procedures for General Support Facilities were both the logical outgrowth of our decision to revise the Separations Manual to achieve conformance and simplification. Moreover, the public had sufficient notice that the Docket

86-297 Joint Board would modify the draft rules if modifications proved necessary to achieve these objectives without producing substantial nationwide changes in revenue requirements.

75. Similarly, we reject the arguments of Bay Springs and Waitsfield-Fayston that the procedures the Docket 80-286 Joint Board and this Commission used to develop new Revenue Accounting Expenses allocations were not sufficient. The public had adequate notice that we would adopt new procedures for Revenue Accounting Expenses that would reflect the reduction in the amount of interstate billing and collecting services provided by the LECs. Moreover, inasmuch as we have decided to ask the Docket 80-286 Joint Board to reexamine Revenue Accounting Expense allocations in the light of subsequent experience, the procedural objections of these carriers are moot.

IV. OTHER MATTERS

A. Regulatory Flexibility Act

76. We certify that the Regulatory Flexibility Act[95] is not applicable to the rule changes we are adopting in this proceeding. In accordance with the provisions of Section 605 of the Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of a summary of this Notice in the Federal Register. As part of our analysis of the proposals submitted in response to this Order, however, the Docket 80-286 Joint Board and this Commission will consider the impact of proposals on small telephone companies, *i.e.*, those serving 50,000 or fewer access lines.[96] The action proposed herein would have a beneficial economic impact on all such telephone companies because the new procedures will reduce administrative burdens and will better reflect cost-causation principles. The carriers will therefore be able to develop rates that better reflect their actual costs.

B. Paperwork Reduction Act

77. We have analyzed the new rules contained herein with respect to the Paperwork Reduction Act of 1980[97] and have tentatively concluded that they will not impose new or modified information collection requirements on the public. Moreover, to the extent that this item is a general solicitation of comments from the public and as such, does not constitute a collection of information.[98] All comments will be considered in this proceeding. Parties need not file data for their comments to be considered in this proceeding. Therefore, implementation of the any new rules will not be subject to approval by the Office of Management and Budget as prescribed by the Paperwork Reduction Act.

C. Ex Parte Rules

78. For purposes of this nonrestricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period.[99] The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or, (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission, Joint Board member or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding.[100]

79. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which: (1) if written, is not served on the parties to the proceeding; or, (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.[101] Any person who submits a written *ex parte* presentation must provide, on the same day it is submitted, a copy of the same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide, on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the Commissioner, Joint Board member or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state, by docket number, the proceeding to which it relates.[102]

80. For Joint Board actions, special *ex parte* rules apply.[103] For Joint Board actions, all written materials that are not filed in accordance with a pleading cycle established by the Joint Board shall be accompanied by a Petition for Leave to File showing cause why the material should be considered by the Joint Board. The Joint Board will not consider any filing made outside the authorized pleading cycle and received by the Commission less than fifteen days[104] in advance of a Joint Board meeting at which the Joint Board is to consider the subject matter of that filing. Written *ex parte* presentations, as defined by the Commission's rules, need not be accompanied by a Petition for Leave to File and may be received in the discretion of the Joint Board member or staff personnel involved. No written *ex parte* presentations, however, shall be made during the fifteen day period immediately preceding a Joint Board meeting except in response to an inquiry by a member of the Joint Board or its staff.

D. Comment Cycle

81. Interested parties may file comments and data on the allocation of Revenue Accounting Expenses on or before September 9, 1988, and reply comments on or before September 26, 1988. In accordance with Sections 1.415 and 1.419 of the Commission's Rules,[105] parties must serve an original and five copies of all comments and five hard copies of the data submissions on the Secretary of the Commission. Parties must serve copies of all comments and hard copies of the data submissions on the Joint Board members and staff listed in Appendix C. Parties must serve two copies of the disk containing the data submissions on the Federal Communication Commission as indicated in Appendix B. Parties must also serve a copy of all comments and a disk and a hard copy containing the data submission on the Commission's contractor for public records duplication, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 837-3800. Copies of the comments

will be available for inspection in the Commission's Docket Reference Room, 1919 M Street, N.W. Room 239, Washington, D.C. 20554.

E. Erratum

82. We also make various additional changes to Part 36 of the Rules to correct certain minor errors in the *Report and Order*. These changes are listed in Appendix A.

V. ORDERING CLAUSES

83. Accordingly, IT IS HEREBY ORDERED, That the Petitions for Reconsideration or Clarification filed in these proceedings ARE GRANTED to the extent provided herein and otherwise ARE DENIED.[106]

84. IT IS FURTHER ORDERED, That the modifications of Part 36 of the Commission's rules described above and set forth in Appendix A ARE ADOPTED, effective thirty days after publication in the Federal Register, except that the interim Section 36.380 will become effective on the effective January 1, 1989.

85. IT IS FURTHER ORDERED, That local exchange carriers shall file revised interstate access charges with a minimum of 45 days notice and an effective date January 1, 1989, to reflect the revised separations procedures for Category 4.23 Central Office Equipment adopted in this Order.

86. IT IS FURTHER ORDERED, That the Docket 80-286 Joint Board shall review the comments, proposals and data filed regarding the separations procedures applicable to Revenue Accounting Expenses and shall prepare recommendations to this Commission on the issues raised herein.

87. IT IS FURTHER ORDERED, That the Petition for Waiver of Section 36.381 of this Commission's Rules filed by the Bay Springs Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] The following parties filed petitions for reconsideration or clarification: the Ameritech Operating Companies (Ameritech), the Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation and its Operating Telephone Companies (BellSouth), the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West), New York Telephone Company and New England Telephone Company (NYNEX), Pacific Bell (Pacific), the Southern New England Telephone Company (SNET), Southwestern Bell Telephone Company (Southwestern), the United States Telephone Association (USTA), United Telephone System Companies (United), the National Exchange Carrier Association (NECA), the Public Service Commission of the District of Columbia (DC), the Waitsfield-Fayston Telephone Corporation and the Merrimack County Telephone Company (Waitsfield-Fayston), the Independent Alliance, and the National Association of State Utility Consumer Advocates and the Citizens of Florida (NASUCA). The following parties filed oppositions to the petitions or comments: the American Telephone and Telegraph Company (AT&T), BellSouth, USTA, Southwestern, the People of the State of California and the Public Utilities Commission of the State of California (California), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), DC, the Western Union Telegraph Company (Western Union), NYNEX, Bell Atlantic, GTE Service Corporation and its affiliated telephone operating companies (GTE), and Bay Springs Telephone Company (Bay Springs). Bay Springs's pleading is also a Petition for Waiver. The following parties filed replies: NYNEX, Pacific, Southwestern, Bell Atlantic, BellSouth, Ameritech, GTE, USTA, and US West.

[2] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket Nos. 78-72, 80-286 and 86-297, 2 FCC Rcd 2639 (1987)(*Report and Order*).

[3] This proceeding was instituted in Amendment of Part 67 of the Commission's Rules, CC Docket No. 80-286, 78 FCC 2d 837 (1980) (*NPRM*).

[4] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 2 FCC Rcd 2551 (1987)(*COE Recommended Decision and Order*). For a detailed discussion of the background of this proceeding, see *id.* at 2553.

[5] *Report and Order*, 2 FCC Rcd at 2642.

[6] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 2 FCC Rcd 3787 (1987)(*Category 3 COE Order Inviting Comments)* (considering switched- minutes-of-use and other relative use allocation factors).

[7] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 2 FCC Rcd 6333 (1987)(*Category 4 COE Order Inviting Comments)*.

[8] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2078 (1987)(*Account 662 Recommended Decision and Order)*.

[9] *Report and Order*, 2 FCC Rcd at 2642. Under the revised Part 32 Uniform System of Accounts, the larger (Class A) carriers record these expenses in Account 6623, whereas the smaller (Class B) carriers use simplified procedures to record them in Account 6620, which is a summary account. Under the new Part 36 procedures, the former Revenue Accounting Expenses are included in Category 2 Customer Operations Expenses which is Customer Services Expenses (Revenue Accounting). In this Order, we refer to these expenses as Revenue Accounting Expenses.

[10] 47 C.F.R. Part 32. Part 31 was replaced by Part 32 effective January 1, 1988.

[11] Amendment of Part 67 of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket No. 86-297, FCC 86-312, released July 8, 1986 (*Conformance NPRM).*

[12] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 86-297, 2 FCC Rcd 2582 (1987)(*Conformance Recommended Decision and Order),*

[13] MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286 and 86-297, 2 FCC Rcd 5349 (1987).

[14] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, FCC 88J-1, released May 16, 1988.

[15] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, FCC 86J-1, released May 7, 1986, 51 Fed. Reg. 21,000 (June 10, 1986)(*COE Order Inviting Comments*), at Appendix C.

[16] 47 C.F.R. §36.126(e)(3).

[17] The Docket 80-286 Joint Board had recommended that procedure. *COE Recommended Decision and Order*, 2 FCC Rcd at 2566-67.

[18] 2 FCC Rcd at 2566.

[19] *See* note 7 *supra*.

[20] *COE Recommended Decision and Order*, 2 FCC Rcd at 2557 (Table D). This estimated impact was based on 1984 data from 269 study areas.

[21] *See id.* at 2565.

[22] *See* Opposition of NYNEX at 12; Petition of Southwestern at 17.

[23] *Report and Order*, 2 FCC Rcd at 2642.

[24] *Category 4 COE Order Inviting Comments*, 2 FCC Rcd at 6336-37.

[25] *Id.* at 6349. Forty-one parties have filed data for 208 study areas in that phase of Docket No. 80-286.

[26] These expenses are currently recorded in Account 6623 by the Class A carriers and in Account 6620 by the Class B carriers. Under the new Separations Manual, these expenses are included in Category 1 Customer Operations Expenses, Local Business Office Expenses. 47 C.F.R. §36.377.

[27] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, Mimeo No. 3400, released March 25, 1985, 50 Fed. Reg. 14,729 (April 15, 1985), at para. 25. This recommendation was adopted by the Commission in MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, FCC 85-283, released June 7, 1985, 50 Fed. Reg. 26,204 (June 25, 1985), *recon. denied*, FCC 86-176, released May 1, 1986, *appeal dismissed sub nom.* American Tel. & Tel. Co. v. FCC, No. 85-1470 (D.C. Cir. August 13, 1986).

[28] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, FCC 86J-3, released July 25, 1986, 51 Fed. Reg. 30,522 (August 27, 1986).

[29] 2 FCC Rcd at 2642.

[30] Other Billing and Collecting Expense includes expenses incurred in preparing and rendering customer bills (including end user access charges), applying service orders to billing records, station statistical work, controlling record work, and preparing revenue reports. This subcategory also includes other expenses not specifically included in the Message Processing Expense and Carrier Access Charge Billing and Collecting Expense subcategories. *See* 47 C.F.R. §36.380(a). *See also Account 662 Recommended Decision and Order*, 2 FCC Rcd at 2083. Under the new procedures, the former Other Billing and Collecting Processing Expense and End User Common Line Access Charge Billing Expense subcategories are combined into the new Other Billing and Collecting Expenses subcategory. *See* former Sections 67.384 and 67.385 of this Commission's Rules (replaced January 1, 1988).

[31] The rules require carriers to determine the relative number of users of the following eight services: interstate message toll, state message toll, interstate private line, state private line, exchange, directory advertising, interstate TWX, and state TWX. In determining the number of users, an individual customer is counted once for each class of service which it uses; for example, a customer may be counted both as an interstate or state message toll service user and as an exchange service user. 47 C.F.R. §36.380(b).

[32] Recently, the Common Carrier Bureau (Bureau) allowed carriers to use the relative percentage of interstate and state messages for 1984 to estimate user counts for state and interstate toll users for the frozen base period. This 1984 user count is compared with the user count for the current period, which is the previous year, to derive a ratio that will reflect the reduction in billing and collecting functions performed by the LECs on behalf of AT&T. The Bureau noted that this is an interim arrangement, pending the outcome of the instant petitions for reconsideration. The Bureau denied requests for waiver to allow the calculation of the current period to be based on a message count, rather than a user count. For the 1988 access tariff filing only, however, the Bureau allowed carriers to calculate the current period interstate factor based on the data available, *i. e.*, for only part of 1987. The Bureau noted that, through the use of these surrogate procedures, the carriers will be able to meet the requirements of our Rules without the need for a waiver. *See* Annual 1988 Access Tariff Filing Petitions for Waiver, 2 FCC Rcd 5659, 5663 (1987).

[33] For a detailed description of these procedures, see 47 C.F.R. §36.380.

[34] The parties supporting reconsideration are: Ameritech, Bay Springs, Bell Atlantic, DC, NYNEX, OPASTCO, Pacific, GTE, SNET, Southwestern, United, USTA, and Waitsfield-Fayston. In response to the petitions, AT&T supports certain modifications of the new procedures.

[35] GTE asserts that, for its companies alone, the new procedures will shift over 17 million to the interstate jurisdiction. *See* Comments of GTE at 6.

[36] Pacific objects only to the maximum interstate allocation.

[37] *See* Comments of USTA at Appendix; Comments of Southwestern at Appendix A; Petition of NYNEX at n. 6.

[38] These parties are USTA, Pacific, BellSouth, Bell Atlantic, NYNEX, Ameritech, OPASTCO, GTE, Southwestern, and SNET.

[39] Southwestern requests that we include the separations procedures for Category 1 Customer Operations Expenses, Local Business Office Expense, in such a proceeding. That request is not within the scope of this reconsideration proceeding.

[40] *See Account 662 Recommended Decision and Order*, 2 FCC Rcd at 2083.

[41] *See id.*

[42] *See supra* para. 21.

[43] *See Account 662 Recommended Decision and Order*, 2 FCC Rcd at 2082 (Table).

[44] *See supra* note 31.

[45] We are not requiring carriers to revise access charges at this time to reflect this decision. Carriers will be required to reflect the interim reinstatement of the former Part 67 procedures in the next annual access tariff filing.

[46] *See* Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, to Conform It With Part 36, Jurisdictional Separations Procedures, 2 FCC Rcd 6447, 6453 (1987), *petitions for recon. filed*, November 5, 1987.

[47] Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150 (1986), *recon. denied*, 1 FCC Rcd 445 (1986).

[48] 47 C.F.R. §36.741. These account categories are: Account 6410, Cable and Wire Facilities Expenses; Account 6530, Network Operations Expenses; Account 6210, Central Office Switching Expenses; Account 6220, Operators System Expenses; Account

6230, Central Office Transmission Expenses; Account 6620, Customer Services (Local Business Office Expenses); and Account 6620, Customer Services (Revenue Accounting Expenses).

[49] 47 C.F.R. §36.631.

[50] For a description of the separations procedures applicable to the former Category 6 COE, see the former Section 67.138 of this Commission's Rules, (replaced January 1, 1988).

[51] From 1971 to 1982, SPF was developed by applying specified factors to annual average interstate subscriber line usage (SLU). SLU is the annual average interstate subscriber line use and represents the interstate use of the subscriber plant as measured by the ratio of interstate holding time minutes-of-use to total minutes-of-use applicable to traffic originating and terminating in the study area. The development of SLU is set forth 47 C.F.R. §36.154(e). A 1981 frozen SPF was subsequently used in the former Part 67 to allocate the NTS portion of the former Category 6 COE.

[52] *See* 47 C.F.R. §36.125.

[53] *COE Recommended Decision and Order*, 2 FCC Rcd at 2559.

[54] *Id.* at 2558.

[55] Southwestern argues that, for digital equipment, switching costs are virtually 100 percent TS. *See* Opposition of Southwestern at n. 25.

[56] Electromechanical switches accounted for approximately 37 percent of the industry's total Category 3 COE investment in 1985. Moreover, the portion of total access lines routed through electromechanical switches declined from 38 percent in 1984 to 25 percent in 1986. *See* FCC Statistics of Communications Common Carriers, 1984 and 1986.

[57] *COE Recommended Decision and Order*, 2 FCC Rcd at 2559.

[58] 47 C.F.R. §69.106.

[59] *Category 3 COE Order Inviting Comments*, 2 FCC Rcd at 3788-89.

[60] *COE Recommended Decision and Order*, 2 FCC Rcd at 2557 (Table F). These figures are based on 1984 data for 435 study areas.

[61] *See id.* at 2561.

[62] *Category 3 COE Order Inviting Comments*, 2 FCC Rcd at 3789.

[63] *COE Recommended Decision and Order*, 2 FCC Rcd at 2567-68.

[64] *Report and Order*, 2 FCC Rcd at 2642.

[65] 47 C.F.R. §36.123.

[66] *See supra* notes 6 and 7.

[67] Amendment of Part 67 of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket No. 86-297, FCC 86J-4, released July 25, 1986, 51 Fed. Reg. 29,176 (August 14, 1986), at paras. 6-14. (*Conformance Order Inviting Comments). See also Conformance Recommended Decision and Order*, 2 FCC Rcd at 2584.

[68] *Report and Order*, 2 FCC Rcd at 2642.

[69] *Conformance Recommended Decision and Order*, 2 FCC Rcd at 2586.

[70] *Id.* at 2585-86.

[71] We note that, while DC is one of those study areas, the projected impact on it is not significantly different from that projected for the other study areas whose impact exceeds the nationwide average.

[72] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 2 FCC Rcd 5266 (1987).

[73] 2 FCC Rcd at 2642.

[74] *See Conformance Recommended Decision and Order*, 2 FCC Rcd at 2587.

[75] General Support Facilities include land, buildings, motor vehicles, aircraft, special purpose vehicles, garage work equipment, other work equipment, furniture, office equipment, and general purpose computers. 47 C.F.R. §36.111.

[76] 47 C.F.R. §36.112.

[77] *Conformance Recommended Decision and Order*, 2 FCC Rcd at 2583. These estimated impacts were based on 1984 data submitted for 184 study areas.

[78] *See also* note 71 *supra*.

[79] 47 C.F.R. §36.612(a).

[80] 47 C.F.R. §36.622.

[81] 5 U.S.C. §553(b)(3).

[82] *Id.*

[83] American Iron & Steel Institute v. EPA, 568 F.2d 284, 291 (1977) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 16 (1945)). *See also* South Carolina *ex rel.* Tindal v. Block, 717 F.2d 874, 885 (4th Cir. 1983).

[84] Congress envisioned that changes in separations rules would be developed through a consultative process when it adopted the Joint Board procedures described in Section 410(c) of the Communications Act, 47 U.S.C. §410(c). Reservation Telephone Cooperative v. AT&T, FCC 85-632, released December 5, 1985, at para. 21, *aff'd sub nom.* Reservation Telephone Cooperative v. FCC, 826 F.2d 1129 (1987).

[85] *Conformance NPRM* at para. 4.

[86] C&P of the District of Columbia is a Class A telephone company.

[87] *Conformance Order Inviting Comments* at para. 12 (footnote omitted).

[88] Spartan RadioCasting Co. v. FCC, 619 F.2d 314, 321 (4th Cir. 1980); Forester v. Consumer Prod. Safety Comm'n, 559 F.2d 774, 787 (D.C. Cir. 1977); California Citizens Band Ass'n v. United States, 375 F.2d 43, 48 (9th Cir. 1967).

[89] *See* American Pub. Transit Ass'n v. Goldschmidt, 485 F. Supp. 811, 829 n. 38 (D.C. Cir. 1980).

[90] *See* Daniel Int'l Corp. v. Occupational Safety & Health Review Comm'n, 656 F.2d 925, 932 (4th Cir. 1981).

[91] *Id.*

[92] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 at n. 51 (D.C. Cir. 1973).

[93] 791 F.2d 1016 (2d Cir. 1986)*(NBMC v. FCC)*.

[94] *NBMC v. FCC,* 791 F.2d at 1022 (quoting AFL-CIO v. Donovan, 757 F.2d 330, 338)(D.C. Cir. 1985)).

[95] 5 U.S.C. §601.

[96] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and, therefore, are not small entities as defined by the Regulatory Flexibilty Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of the Regulatory Flexibility Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

[97] 44 U.S.C. §501.

[98] *See* 5 C.F.R. §1320.7(k)(4).

[99] *See generally* 47 C.F.R. §1.1206(a).

[100] 47 C.F.R. §1.1203.

[101] 47 C.F.R. §1.202(b).

[102] 47 C.F.R. §1.1206.

[103] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 89 FCC 2d 36 (1982).

[104] In calculating this fifteen day period, neither the day on which the material is filed nor the day on which the Joint Board meeting is scheduled shall be counted.

[105] 47 C.F.R. §§1.415 and 1.419.

[106] These actions are taken pursuant to 47 U.S.C. §§154(i), 154(j), 201, 202, 203, 205, 218, 221(c), 403, and 410.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 7, 1988

Commissioner Patricia Diaz Dennis releases concurring statement in *Report and Order*, FCC 87-304, released October 15, 1987, 2 FCC Rcd 6600.

FEDERAL COMMUNICATIONS COMMISSION

CONCURRING STATEMENT
OF
PATRICIA DIAZ DENNIS

In Re: Authorization of Common Carrier Facilities to Provide Telecommunications Service off of the Island of Puerto Rico.

The *Report and Order* imposes conditions on the provision of off-island service by the Puerto Rico Telephone Company (PRTC), the predominant provider of local exchange service in Puerto Rico. *See Authorization of Common Carrier facilities to Provide Telecommunications Service off of the Island of Puerto Rico*, FCC 87-304, released October 15, 1987 at para. 3 *(Report and Order)*. Such conditions unnecessarily burden PRTC's entry into the off-island market. Included are regulations requiring PRTC to provide Feature Group D equal access by 1989 and implement certain non-structural safeguards. The *Report and Order* also classifies PRTC as a dominant carrier for off-island International Message Telecommunication Service (IMTS).

These regulations are intended to ensure that PRTC does not use its local exchange carrier (LEC) operations to the advantage of its off-island services. Although the concern is legitimate, regulation imposes costs on the carrier and ultimately the public. The Commission has long and frequently required that regulations should be kept to the minimum necessary to achieve its public interest goals. As I detail below, the *Report and Order* adopts unduly harsh rules in light of the record and Commission policy.

The *Report and Order* allows PRTC to enter off-island markets via end offices capable of providing equal access or interim access for originating and terminating traffic. *Id.* at para. 40. Equal access is "a condition" , but "not a condition precedent to PRTC's entry into the off-island markets." *Id* at n. 53. Nonetheless, PRTC must complete its equal access conversion by 1989, or request the Commission waive this requirement. This condition is based on the conversion schedule contained in PRTC's business plans; PRTC's intention to provide off-island service on an unseparated basis; and PRTC's status as a government-owned LEC. *Id.*

The majority's approach does not recognize PRTC's significant actions to provide equal access, nor the unique set of factual circumstances PRTC faces in its market. Telephone penetration on the island, for example, is substantially below that on the mainland. PRTC has undertaken significant efforts to achieve universal service, including a 520 million network modernization program which will permit multiple off-island carriers to operate and support implementation of Feature Group D equal access. Thus, the record establishes that PRTC's attempting to meet its local exchange carrier obligations to Commonwealth residents, *and* that it will be able to provide off-island carriers with a better type and quality of access. Making PRTC operate under additional, more onerous, requirements than other independent telephone companies, therefore, seems unnecessary.

Under Commission rules, all local exchange carriers must provide exchange carriers with non-discriminatory and, where possible, equal access. In the past, we have based the terms, conditions, and timing under which a LEC should be required to provide equal access on the vintage of switching technology in use and the carriers' ability to meet reasonable requests for service. *See MTS and WATS Market Structure*, 93 FCC 2d 241 (1983) (Phase I), 97 FCC 2d 682 (1983) *further modified on reconsideration*, 97 FCC 2d 834 (1984) *aff'd in part, remanded in part NARUC v. FCC* 737 F.2d 1095 (D.C. Cir. 1984) *cert denied* 469 U.S. 1224 (1985), and *MTS and WATS Market Structure* 100 FCC 2d 860 (1985) (Phase III). Independent telephone companies with stored program control switches are required to provide equal access within three years of a reasonable request for service. Electromechanical and older vintage switches are to be converted as soon as feasible. These requirements recognize the greater burdens and lesser abilities of independents, compared to the Bell Operating Companies, to implement equal access.

Had the facts suggested that PRTC was lagging in its efforts to provide equal access to improve its competitive position, or that its unseperated provision of off-island interexchange service would produce such a result, then a stricter requirement would have been better founded. Although the Commission indicates that it is prepared to waive the Feature Group D equal access condition should it prove unattainable in the allotted time, generally, parties seeking to waive our rules face a high burden. *See WAIT Radio v. FCC* 418 F. 2d 1153 1158 (D.C. Cir. 1969). It is possible, therefore, that PRTC could be *required* to meet this schedule.

Nor do I share the majority's view that PRTC's government ownership militates in favor of the equal access requirement. *Report and Order* para. 40. Indeed, it may be the case that governmental policies or factors well beyond PRTC's control may hinder or prevent the attainment of the currently scheduled conversions. Because PRTC does not stand in the shoes of a typical independent which establishes its goals based solely on business or economic factors, I believe that prudence dictates a more cautious course.

While PRTC's LEC status justifies imposing prior notice of network modifications, separations and cost allocation rules, the *Report and Order* inexplicably imposes customer proprietary network information (CPNI) requirements on PRTC. *Id.* at para. 69. Before now, these rules had been imposed *only* on AT&T and the Regional Bell Operating Companies for providing *CPE* and *enchanced services* on a non-structurally separated basis. The Commission explicitly declined to subject GTE and other independents to the CPNI rules. We have not subjected the interexchange operations of any independent to these rules, regardless of the form of corporate organization used to provide service. The *Report and Order* does not establish a predicate for

extending CPNI rules to PRTC. Nor does it state any regulatory nexus between our CPNI rules and interexchange service. While a case can perhaps be made that *customers* have a vital interest in the collection, dissemination, and use of this information, I do not believe the record supports imposing these rules on PRTC alone among all the independent telephone companies.

Classifying PRTC as a dominant carrier for IMTS also appears unmerited. The analysis the Commission employed in the *International Competitive Carrier* rulemaking evaluated the likelihood that a carrier was or could be dominant in providing *international* service to a particular market. *International Carrier Policies,* 102 FCC 2d 812 (1985). Given that PRTC has no market share in any international market, and that its operating agreements will be subject to Commission scrutiny, classifying it as a dominant carrier is unnecessary. The *Report and Order* asserts that PRTC's LEC status, its control of competitors' access to local facilities, and its proposed provision of service on an integrated basis imply a need for full tariff regulation. On the contrary, however, our accounting, separations, access charge, equal access and the network disclosure rules plus PRTC's zero market share severely reduce, if not altogether eliminate, the possibility of "anticompetitive concerns."

Lastly, our rate integration policies may have an adverse effect on PRTC's ability to compete with AT&T for interstate long-distance traffic. Under those policies, domestic offshore interstate telephone rates were, pursuant to Commission order, integrated into the rate structures that applied on the United States mainland. *See Integration of Rates and Services,* 61 FCC 2d 380 (1976), *recon.,* 65 FCC 2d 324 (1977). Accordingly the rates for service between Puerto Rico and the continental U.S. do not necessarily reflect the costs of serving those routes. In point of fact, rate integration resulted in substantial rate reductions for service between "offshore" points and the U.S. mainland. PRTC, however, does not participate in the nationwide cost averaging that underlies our rate integration policy and thus may find it difficult to compete with AT&T's nationwide averaged rates.

Despite these concerns, the Commission's findings that competition in the provision of domestic and international off-island telecommunication service from Puerto Rico would promote the public interest is ample supported. I also support equal access to end users end PRTC's off-island switch for off-island service providers, and compliance with Parts 67 and 69 of the Commission's Rules. *Id.* at paras. 40, 53 and 64.

For the foregoing reasons, I concur in the Commission's decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 7, 1988

Commissioner Patricia Diaz Dennis releases dissenting statment in *Report and Order*, FCC 88-6, released January 21, 1988, 3 FCC Rcd 984.

FEDERAL COMMUNICATIONS COMMISSION

DISSENTING STATEMENT OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: The Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, as Amended.

I respectfully dissent to the Commission's action for the reasons stated in my dissent in the Report and Order in CC Docket No. 87-447, 3 FCC Rcd 984 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-325

In the Matter of

Amendment of Section 73.202(b), RM-5822
Table of Allotments,
FM Broadcast Stations.
(Wenatchee, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 24, 1988; Released: September 15, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Wenatchee Wireless Works (petitioner), licensee of Station KYJR(FM), Channel 285A, Wenatchee, Washington, the Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd (1987), proposing the substitution of Channel 285C2 for Channel 285A and modification of its license to specify operation on the higher class channel. Petitioner submitted supporting comments reaffirming its intention to improve its facilities.

2. We believe the public interest would be served by the substitution of Channel 285C2 for Channel 285A at Wenatchee, providing that community with a second wide coverage area FM service. The substitution can be made consistent with the Commission's minimum separation requirements with a site restriction of 6.3 kilometers (3.9 miles) southeast of Wenatchee in order to avoid a short spacing to a Canadian allotment in Abbotsford, British Columbia, Channel 285B.[1] Channel 285C2 can be utilized at petitioner's current transmitter site at coordinates 47-28-44 and 120-12-49 in accordance with the Working Arrangement under the Canada-U.S.A. FM Broadcast Agreement as a special negotiated short-spaced allotment. Since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. As requested, we are herein modifying the license of Station KYJR(FM) to specify operation on Channel 285C2 consistent with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Wenatchee, Washington	271C, 285C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KYJR(FM), Wenatchee, Washington, IS MODIFIED, to specify operation on Channel 285C2 in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The restricted site coordinates are 47-23-46 and 120-14-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-487

In the Matter of

Amendment of Section 73.202(b), RM-5965
Table of Allotments,
FM Broadcast Stations.
(Lihue, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 24, 1988; Released: September 15, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of John Hutton Corporation (Petitioner) the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd (1987), proposing to substitute Channel 228C1 for Channel 228A at Lihue, Hawaii. In addition, the *Notice* proposed to modify the station license to specify Channel 228C1. Petitioner filed comments in support of the proposal.

2. After consideration of the proposal, we conclude that the public interest would be served by the channel substitution at Lihue, in order to provide an additional wide area coverage service to Lihue. Channel 228C1 can be allotted to Lihue in compliance with the Commission's minimum distance separation requirements, using the Class A transmitter site.[1] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KQNG-FM to specify operation on Channel 228C1.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Lihue, Hawaii	228C1, 245C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KQNG-FM, IS MODIFIED, to specify operation on Channel 228C1 in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 228C1 are 21-59-33 and 159-24-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-614

In the Matter of

Amendment of Section 73.202(b),	RM-5996
Table of Allotments,	
FM Broadcast Stations.	
(Valley Station, Kentucky)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 24, 1988; Released: September 15, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 324 (1988), proposing the allotment of FM channel 290A to Valley Station, Kentucky, as that community's first FM broadcast service. The *Notice* was issued in response to a petition filed by Mid-America Communications, Inc. (petitioner). Petitioner filed comments restating its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of FM Channel 290A to Valley Station, Kentucky, since it could provide the community with its first FM broadcast service. Channel 290A can be allotted to Valley Station, Kentucky, consistent with the minimum distance separation requirements of the Commission's Rules.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Valley Station, Kentucky	290A

4. The window period for filing applications will open on **November 1, 1988,** and close on **December 1, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Valley Station are 38-06-40 and 85-52-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-114

In the Matter of

Amendment of Section 73.606(b),	RM-5496
Table of Allotments,	RM-5987
Television Broadcast Stations.	RM-5988
(Tallahassee, Port St. Joe, and Panama City Beach, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 24, 1988; Released: September 15, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Family Group Broadcasting (Family), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 2451 (1987), proposing the allotment of UHF TV Channel 24 to Tallahassee, Florida, as the community's third local commercial television channel. Supporting comments were filed by Family and Richard Y. Clark (Clark). In addition, comments and counterproposals were filed by: (1) Tallahassee--27 Limited Partnership, licensee of Station WTXL-TV, Channel 27, Tallahassee (WTXL), proposing the allotment of Channel 24 to Port St. Joe, Florida, as the community's first local television service (RM-5987), and (2) the G. Weaver Corporation (Weaver), proposing the allotment of Channel 24 to Panama City Beach, Florida, and the alternative allotment of Channel 46, 62, 65 or 69 to Tallahassee (RM-2988).[2] Reply comments were filed by Family, Weaver and WTXL. [3]

2. WTXL disputes Family's contention that Tallahassee has inadequate local television service. It states that the community is part of the Tallahassee, Florida-Thomasville, Georgia ADI. WTXL points out that the community receives local service from two commercial stations, WTXL-TV, Channel 27, and Station WTWC, Channel 40, which are ABC and NBC affiliates, respectively, and noncommercial educational service from Station WFSU-TV, Channel 11. In addition, WTXL states that Tallahassee receives service from WCTV(TV), Thomasville, Georgia, Station WALB-TV, Albany, Georgia, and Stations WJHG-TV and WMBB(TV), Panama City, Florida, as well as future service from Station WTLH(TV), Bainbridge, Georgia, when it becomes operational. Based on this showing, WTXL concludes that Tallahassee already receives more than adequate service and that the public interest would be better served by allotting Channel 24 to a community without local service. To this end, it proposes that Channel 24 be allotted to Port St. Joe, Florida, which it states has no local transmission service and which currently receives no city-grade service. WTXL also argues that the introduction of a new local service at Tallahassee would create increased competition for audience and revenue which would adversely affect the ability of the existing stations to continue providing high quality public service programming. It states that existing economic conditions have already forced WTXL-TV to curtail its operations. Finally, WTXL points out that the allotment of Channel 24 would likely cause low power Station W17AB, Tallahassee, to either cease operation or move to another channel since the low power station would be likely to cause interference to any future Tallahassee Channel 24 full service TV station.

3. Family and Clark both support the allotment of Channel 24 to Tallahassee and state their intention to apply for the channel, if allotted. Family, in its reply comments, urges the allotment of Channel 24 to Tallahassee based on the community's larger population than either Port St. Joe or Panama City Beach and its status as the state capital.

4. WTXL, in reply comments, reiterates the economic impact and adequate service arguments which it advanced in its initial comments. It also opposes the alternative allotment of Channel 46, 62, 65 or 69 to Tallahassee, stating that these channels could be allotted to other communities in Florida and Georgia, as first local services.

5. After reviewing the pleadings before us, we find that the public interest would be served by allotting Channel 24 to Tallahassee since it could provide the community with its third local commercial television service. Broadcast frequencies are allotted to communities in response to a stated intention to apply for the channel. Absent such an expression of interest, the Commission generally refrains from allotting a channel. *See, e.g., Murray, Kentucky*, 3 FCC Rcd 3016 (1988) and *Pine, Arizona*, 3 FCC Rcd 1010 (1988). Here, WTXL requests the allotment of Channel 24 to Port St. Joe and the allotment of Channels 46, 62, 65 and 69 to other communities in Florida and Georgia, rather than to Tallahassee. However, neither it nor any other party has stated an intention to apply for the channels. Therefore, in accordance with Commission policy, we shall not allot any of the channels counterproposed by WTXL.

6. Additionally, WTXL contends that the allotment of a third commercial channel to Tallahassee would cause economic harm to the stations in the market and thus adversely affect the service being provided to the community. Arguments concerning the possible adverse economic impact of a new allotment on existing services have generally been left for consideration at the application stage when the Commission could evaluate the actual impact of the channel based on the application for its use. *See Grand Junction, Colorado*, 3 FCC Rcd 2071 (1988) and cases cited therein. Moreover, by *Report and Order* in MM Docket 87-68, the Commission abolished its consideration of such *Carroll* doctrine issues, stating that it had determined that additional competition to existing broadcast stations by new full service stations is beneficial to the public. *See*, 3 FCC Rcd 638 (1988). WTXL also argues that Tallahassee is already well served by local stations as well as by stations located in other Florida and Georgia communities. However, the Commission has also long held that service from nearby communities is not a substitute for local service. Finally, we also find that consideration of the displacement of the low power station by the activation of a full service station is not warranted. Low power stations are secondary services and thus are not

entitled to protection against the initiation of a new full service operation. *See* Section 74.702(b) of the Commission's Rules.

7. Channel 24 can be allotted to Tallahassee in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.6 kilometers (10.4 miles) south to avoid a short-spacing to Stations WGXA, Channel 24, Macon, Georgia, and WTXL-TV, Channel 27, Tallahassee.[4] However, this allotment is 317.7 kilometers from Tampa, Florida, which is less than the appropriate 329.0 kilometer freeze radius and applications may not be accepted for filing if the Commission's freeze on such applications is still in effect. *See, Order*, 52 FR 28346, July 29, 1987.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 31, 1988,** the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Tallahassee, Florida	*11-, 24, 27+, 40+

9. IT IS FURTHER ORDERED, That the counterproposal filed by Tallahassee--27 Limited Partnership requesting the allotment of Channel 24 to Port St. Joe, Florida, IS DENIED.

10. IT IS FURTHER ORDERED, That the counterproposal filed by The G. Weaver Corporation requesting the allotment of Channel 24 to Panama City Beach, Florida, IS DISMISSED AS MOOT.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Port St. Joe and Panama City Beach have been added to the caption.

[2] Public Notice of the counterproposals was given on July 2, 1987, Report No. 1666.

[3] The Commission, at Weaver's request, proposed the allotment of Channel 46 to Panama City Beach, Florida (MM Docket 86-273, 51 FR 24877, published July 9, 1986). Due to the difficulty it envisioned in complying with the proposed 17 mile southeast site restriction, Weaver alternatively proposed the allotment of Channel 24 to Panama City Beach in MM Docket 86-273 and as a counterproposal herein. Based upon a finding that a site restriction is not necessary, the Commission has allotted Channel 46 to Panama City Beach. *See*, Report and Order, MM Docket 86-273, adopted August 5, 1988. Therefore, we will dismiss Weaver's counterproposal herein as moot and will not consider it or the comments responsive to it.

[4] The coordinates for this allotment are North Latitude 30-17-56 and West Longitude 84-19-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-375

In the Matter of

Amendment of Section 73.202(b),	RM-5827
Table of Allotments,	RM-6153
FM Broadcast Stations.	RM-6222
(Geneva, Alabama, Freeport and Southport, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 23, 1988; Released: September 15, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Gary Randall Billingsley and Paul H. Reynolds (B&R), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 5628 (1987), proposing the allotment of Channel 229A to Freeport, Florida, as the community's first local FM service. In response to the *Notice*, a counterproposal was filed by Southport Broadcasting Company (SBC), requesting the allotment of Channel 229A to Southport, Florida, as the community's first local FM service.[2] On our own motion, the Commission also accepted as a counterproposal the mutually exclusive request of Geneva County Broadcasting Company, Inc. (Geneva County), licensee of Station WGEA-FM, Geneva, Alabama, to substitute Channel 229C2 for Channel 228A at Geneva and modify its license accordingly.[3] Comments were filed by the petitioner and by Shelley Broadcasting Co., Inc. (Shelley), the new licensee of Station WRJM-FM (formerly WGEA-FM) at Geneva.[4] B&R filed reply comments responding to the comments and counterproposals of SBC, Geneva County and Shelley.

2. These proposals are mutually exclusive since Freeport and Southport are located less than the required distance for co-channel Class A allotments and Geneva is located less than the required distance from both Freeport and Southport for co-channel Class A and C2 allotments. However, B&R and SBC have each withdrawn their respective proposals for Freeport and Southport, and no other party has filed comments expressing an interest in the use of either channel. Therefore, the comments which concern these allotments need not be discussed and in accordance with Commission policy we will grant their dismissal requests.

3. In light of the withdrawal of both the Southport and Freeport proposals, there remains no impediment to the substitution of Channel 229C2 for Channel 228A at Geneva. We believe the public interest would be served by granting Shelley's proposed substitution and modification of its license since it could enable Station WRJM-FM to expand its service to Geneva and its environs. Additionally, in accordance with Section 1.420 of the Commission's Rules, we shall modify the license of Station WRJM-FM to specify operation on the higher powered channel. Channel 229C2 can be allotted to Geneva in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.1 kilometers (12.5 miles) south to avoid a short-spacing to unused Channel 226A at Fort Rucker, Alabama, and to Station WBBK-FM, Channel 228A at Blakely, Georgia.[5]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Geneva, Alabama	229C2

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Shelley Broadcasting Company, Inc. for Station WRJM-FM, Geneva, Alabama, IS MODIFIED effective **October 31, 1988,** to specify operation on Channel 229C2 in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the requests of Gary Randall Billingsley and Paul H. Reynolds to allot Channel 229A to Freeport, Florida (RM-5827) and Southport Broadcasting Company to allot Channel 229A to Southport, Florida (RM-6222), ARE DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Geneva, Alabama, and Southport, Florida, have been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on January 15, 1988, Report No. 1707.

[3] Public Notice of the counterproposal was given on November 25, 1987, Report No. 1693.

[4] Shelley's comments also contained an alternate proposal seeking the allotment of Channel 229C2 to Geneva, Channel 227A to Freeport, the substitution of Channel 228C2 for Channel 228A at Evergreen, Alabama, and the substitution of Channel 250A for Channel 228A at Butler, Alabama. This alternative proposal was not given public notice and in light of the decision herein need not be considered.

[5] The coordinates for this allotment are North Latitude 30-52-05 and West Longitude 85-48-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-27

In the Matter of

Amendment of Section 73.202(b), RM-6041
Table of Allotments,
FM Broadcast Stations.
(Howland, Maine)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 23, 1988; Released: September 15, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd. 665 (1988), issued in response to a petition filed by Robert J. Cole (petitioner). The *Notice* proposed the allotment of FM Channel 280A to Howland, Maine, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated his intention to apply for the channel. No other comments were received.

2. Channel 280A can be allotted to Howland, Maine, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1] Since the allotment of Channel 280A to Howland is within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. In view of the fact that the proposed allotment could provide a first FM broadcast service to Howland, we believe the public interest would be served by a grant of the petitioner's request.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Howland, Maine	280A

5. The window period for filing applications will open on **November 1, 1988,** and close on **December 1, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 280A at Howland are 45-14-18 and 68-39-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-607

In the Matter of

Amendment of Section 73.202(b),	RM-6040
Table of Allotments,	
FM Broadcast Stations.	
(Jesup and Swainsboro, Georgia)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 23, 1988; Released: September 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Bohanan Associated Broadcasters, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 254 (1988), proposing the substitution of Channel 252C1 for Channel 252A at Jesup and the modification of its license for Station WZKS(FM) to specify the higher powered channel, and the substitution of Channel 251A for Channel 252A at Swainsboro, Georgia, and the modification of Radio Station WJAT, Inc.'s license for Station WGKS(FM) to specify the proposed Class A channel.[1] Petitioner filed comments reiterating its intention to apply for Channel 251C2, if allotted to Jesup. No other comments were received.

2. We believe the public interest would be served by substituting Channel 252C1 for Channel 252A at Jesup since it could enable Station WZKS(FM) to expand its coverage area. Radio Station WJAT, Inc. did not file comments concerning the modification of its license for Station WJAT-FM at Swainsboro and thus is deemed to have consented to the modification as proposed. Channel 252C1 can be allotted to Jesup in compliance with the Commission's minimum distance separation requirements with a site restriction of 42 kilometers east to accommodate petitioner's proposed transmitter site. Channel 251A can be allotted to Swainsboro in compliance with the Commission's minimum distance separation requirements and can be used at the current transmitter site of Station WJAT-FM.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Jesup, Georgia	252C1, 288A
Swainsboro, Georgia	251A, 280A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Bohanan Associated Broadcasters, Inc. for Station WZKS(FM), Jesup, Georgia, IS MODIFIED, effective **November 3, 1988,** to specify operation on Channel 252C1 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WJAT-FM, Swainsboro, Georgia, IS MODIFIED to specify operation on Channel 251A in lieu of Channel 252A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WJAT-FM's license, BLH-3442, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-3442, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee, as follows: Radio Station WJAT, Inc., P.O. Box 289, Swainsboro, Georgia 30401.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The call letters of Station WGKS(FM) were changed to WJAT-FM on March 28, 1988.

[2] The coordinates for the Jesup allotment are North Latitude 31-37-46 and West Longitude 81-26-19. The coordinates for the Swainsboro allotment are North Latitude 32-35-08 and West Longitude 82-21-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-592

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Iron River and Kingsford, Michigan) RM-6022

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 29, 1988; Released: September 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 3 FCC Rcd 61 (1988), issued in response to a petition filed by Northland Advertising, Inc. (petitioner), proposing the substitution of FM Channel 256C2 for Channel 257A at Iron River, Michigan. Petitioner also requested the modification of its license for Station WIKB-FM, Channel 257A, to specify operation on Channel 256C2. In addition, the *Notice* proposed the substitution of Channel 251A for Channel 255A at Kingsford, Michigan, to accommodate the allotment of Channel 256C2 at Iron River. Petitioner filed supporting comments. No other comments were received.

2. We believe the public interest would be served by the substitution of FM Channel 256C2 for Channel 257A at Iron River, since it could provide the community with its first wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at the current site of Station WIKB-FM.[1] As indicated in the *Notice*, to accommodate the channel substitution at Iron River, it is necessary to substitute Channel 251A for Channel 255A at Kingsford, Michigan. Channel 255A was allotted to Kingsford in MM Docket 84-231 and made available for application in Window No. 11. A construction permit for this channel has been issued to Edward and Alice Slater (BPH 860507PN). The substitution at Kingsford can be accomplished in compliance with the minimum distance separation requirements at the authorized site for Channel 255A.[2] The *Notice* gave Edward and Alice Slater until February 29, 1988, to file a written statement regarding the proposed substitution and further indicated that if no written statement was filed by that date, they would have consented to the modification as proposed in the Order to Show Cause. Since a written statement has not been received at the Commission from the permittees, they will be deemed to have consented to the modification. Petitioner, in comments, has indicated a willingness to reimburse the permittees for Channel 255A for all reasonable costs incurred in changing frequencies. Therefore, we shall substitute FM Channel 251A for Channel 255A at Kingsford, Michigan. Since the communities of Iron River and Kingsford are both with 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. We have authorized a modification of petitioner's license for Station WIKB-FM, Iron River, Michigan, to specify operation on Channel 256C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. As discussed above, we find the substitution of Channel 256C2 for Channel 257A at Iron River, Michigan, and the substitution of Channel 251A for Channel 255A at Kingsford, Michigan to be in the public interest. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the communities listed below:

City	Channel No.
Iron River, Michigan	256C2
Kingsford, Michigan	251A

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WIKB, Iron River, Michigan, IS MODIFIED to specify operation on Channel 256C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the permit of Edward and Alice Slater for Channel 255A at Kingsford, Michigan, IS MODIFIED, effective **November 3, 1988,** to specify operation on Channel 251A in lieu of Channel 255A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in permit BPH 860507PN except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with permit BPH 860507PN except for the

channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 256C2 at Iron River are 46-06-03 and 88-32-23.

[2] The coordinates for Channel 251A at Kingsford are 45-49-57 and 88-04-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-400

In the Matter of

Amendment of Section 73.202(b),	RM-5809
Table of Allotments,	RM-5908
FM Broadcast Stations.	
(Mosinee and Shawano, Wisconsin)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 29, 1988; Released: September 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 5996 (1987), which optionally proposed the allotment of Channel 234C2 to either Mosinee, Wisconsin (RM-5809) or Shawano, Wisconsin (RM-5908). The *Notice* was issued in response to separate request by: (1) William A. Kasten (Kasten), seeking the allotment of Channel 234C2 to Mosinee, as a first local FM service; and (2) Wheeler Broadcasting, Inc. (Wheeler), licensee of Station WOWN(FM), Channel 257A, Shawano, proposing the substitution of Channel 234C2 for Channel 257A and modification of the license for Station WOWN(FM) to specify operation on the higher class channel. Kasten and Wheeler filed supporting comments reaffirming an intention to apply for the channel at their respective community. Saga Communications, Inc. (Saga), filed comments supporting the allotment to Shawano and expressing an interest in applying for the channel. Late-filed comments were submitted by F.W.K. Broadcasting Co. (F.W.K.), permittee of Channel 258A at New Holstein, Wisconsin.[1] Reply comments were filed by Kasten, Wheeler and Mid-West Media, Inc. (Mid-West), licensee of Station WSAU(AM) and WIFC(FM), Wausau, Wisconsin.[2]

2. Kasten, in his comments, urges the Commission to allot the Class C2 channel to Mosinee as a first local radio service instead of the enlargement of the existing service at Shawano. Kasten contends that based on the established assignment criteria preference should be given to the Mosinee proposal. Kasten submitted documentation in support of his proposal from government and business leaders of Mosinee.

3. Wheeler in its comments argues that the public interest would be better served by the allotment of Channel 234C2 to Shawano, rather than Mosinee, because Shawano is more populous than Mosinee (7,284 persons as opposed to Mosinee's 3,205 persons). Wheeler alleges that the Shawano proposal would serve a gray area of 18.4 square miles and 222 people. Wheeler states that considering the size and population of Mosinee a Class A facility would be more suitable there. In addition, Wheeler claims that the allotment to Mosinee may not provide a city-grade signal over the community from the proposed restricted site because of terrain shadowing. Wheeler asserts that the restricted site would place the transmitter for Channel 234C2 at Mosinee behind a mountain range causing terrain shadowing. Wheeler also suggests the allotment of a Class A channel to Shawano.

4. In reply comments, Wheeler continues to strongly support its proposal to upgrade at Shawano. Wheeler acknowledges the expression of interest submitted by Saga for Channel 234C2 at Shawano, but states that "Saga is apparently confused" since the substitution would mean the modification of its license.

5. Mid-West, in its reply comments, supports Wheeler's suggestion to allot a Class A channel to Mosinee. Mid-West urges that the public interest benefits with the Class A allotment to Mosinee and permitting the upgrade at Shawano would be better than granting one proposal and rejecting the other.

6. In reply comments, Kasten contends that Wheeler's claim for provision of service to "a small gray area" is in error. Kasten states that Wheeler fails to include service from Station WLST(FM) in Marinette, Wisconsin, in its engineering showing. In response to issues raised by Wheeler concerning possible terrain shadowing, Kasten states that there are several available sites to provide an unobstructed path to Mosinee. Kasten reiterates his interest in Channel 234C2 at Mosinee.

DISCUSSION

7. The Commission's staff has determined that, contrary to Wheeler's claim, no underserved gray area would gain additional service if Channel 234C2 is allotted to Shawano. The gray area claimed by Wheeler does not exist because the analysis is incorrect. Our policy for determining gray areas requires that maximum facilities be assumed and used for Class C1 and C2 stations rather than using actual operating facilities as Wheeler did. When using maximum facilities the gray area claimed by Wheeler lies within the 1 mV/m service contours of Class C1 stations WRVM(FM), Suring, Wisconsin, WDUZ-FM, Green Bay, Wisconsin, WLST(FM), Marinette, Wisconsin, and WRLO-FM, Antigo, Wisconsin.

8. Furthermore, since Wheeler's Shawano proposal was for an upgrade to a non-adjacent channel, it was not protected from other parties expressing an interest in applying for the Class C2 channel. The *Notice* stated that if another party expressed an interest in the allotment of Channel 234C2 at Shawano the license of Station WOWN(FM) might not be modified in accordance with Section 1.420(g) of the Commission's Rules. *See Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984). Here, we have a bona fide expression of interest filed by Saga for the Class C2 channel at Shawano. Therefore, consideration will be given to the allotment of a second FM service at Shawano.

9. We consider the arguments raised against the Mosinee proposal on the basis of potential shadowing invalid. Staff engineering analysis has substantiated Kasten's claim as to the existence of potential sites sufficient to provide a city-grade signal over Mosinee. In addition, the fact that Class A channels may be available at Mosinee as a first local service, as suggested by Wheeler and supported by Mid-West, is irrelevant. The expression of interest at Mosinee was for a Class C2 facility.

10. As stated in the *Notice*, the Mosinee and Shawano proposals are mutually exclusive because the distance between the communities is less than the 190 kilometers (118 miles) required for Class C2 co-channel allotments. Although both communities are deserving of receiving a new FM service, our engineering analysis has determined that Channel 234C2 is the only available channel at either community. Thus, we are unable to resolve the conflict and the proposals must be comparatively considered using the allocation criteria set forth in the *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

(1) First fulltime aural service

(2) Second fulltime aural service

(3) First local service

(4) other public interest matters

[Co-equal weight given to priorities (2) and (3)]

Shawano is currently served by Station WOWN(FM) and AM Station WTCH. Channel 234C2 could provide a second local FM service to Shawano. Mosinee is devoid of any local broadcast service. The allotment of Channel 234C2 to Mosinee could provide that community with its first local FM broadcast service.

11. We have determined that no first or second fulltime aural service would be provided by either proposal. Thus, priorities (1) and (2) enumerated above do not apply. The Mosinee proposal would provide that community with a first local broadcast service and would be entitled to priority (3). The Mosinee proposal must be preferred over a second FM service at Shawano, priority (4).

12. We believe the allotment of Channel 234C2 to Mosinee as a first local FM service could serve the public interest. The allotment can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules with a site restriction. A site restriction of 18.6 kilometers (11.6 miles) north of the city is necessary to avoid a short spacing to Station WILV(FM), Channel 235B, Baraboo, Wisconsin. [3]

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Mosinee, Wisconsin	234C2

14. The window period for filing applications will open on **November 4, 1988,** and close on **December 5, 1988.**

15. IT IS FURTHER ORDERED, That the petition of Wheeler Broadcasting, Inc., for the substitution of Channel 234C2 for 257A at Shawano, Wisconsin (RM-5908), IS DENIED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] F.W.K. also included a Motion for Acceptance of Late Filed Comments. F.W.K. states that it has no objection to the allocation of a different channel to New Holstein in order to accommodate the Shawano proposal. However, F.W.K. urges that the Commission consider Channel 226A rather than 225A at New Holstein, as proposed in the *Notice*. F.W.K. states that such action would "free up" the proposed allocation of Channel 234C2 to either Shawano or Mosinee. F.W.K. argues that the construction of its facilities on Channel 258A has been impeded by the uncertainty caused by the instant proceeding as well as the Waupun, Wisconsin proposal currently pending before the D.C. Circuit Court of Appeals, *James R. Coursolle v. FCC and U.S.A., FCC 86-1618. Therefore, in order to expedite the construction of a first FM station at New Holstein, F.W.K. urges the allotment of Channel 226A to New Holstein to remove the conflict. We have not accepted the comments for consideration herein. The Commission currently has the request under consideration in a separate proceeding in MM Docket No. 88-270, 3 FCC Rcd 3163 (1988).*

[2] Wheeler subsequently filed a supplement to its reply comments.

[3] The coordinates are 44-56-55 and 89-41-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-310

In the Matter of

Amendment of Section 73.202(b),	RM-5851
Table of Allotments,	RM-6121
FM Broadcast Stations.	
(Chippewa Falls, Wisconsin and	
Red Wing, Minnesota)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 29, 1988; Released: September 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 5083 (1987), proposing the substitution of Channel 291C2 for Channel 288A at Chippewa Falls, Wisconsin, at the request of Bushland Radio Specialities (petitioner), licensee of Station WCFW(FM). The *Notice* also proposed the modification of petitioner's license for Station WCFW(FM) at Chippewa Falls to specify operation on the higher class channel, thereby providing that community with a first wide coverage area station. In response to the *Notice*, Sorenson Broadcasting Corp. (Sorenson), licensee of Station KWNG(FM), Channel 288A at Red Wing, Minnesota filed a motion to consolidate this proceeding with MM Docket No. 87-306, 2 FCC Rcd 4616 (1987).[2] Sorenson also filed a counterproposal and an errata thereto requesting the substitution of Channel 290C2 for Channel 288A at Red Wing. [3] Petitioner filed supporting comments restating its intention to effectuate the improved facilities. Sorenson filed reply comments reaffirming its intention to file an application for the upgrade at Red Wing. Petitioner submitted late-filed reply comments, an amendment and supplement thereto.[4]

2. In its comments, Sorenson argues that its proposal to upgrade at Red Wing would serve a greater number of persons than would the Chippewa Falls proposal. In support of the Red Wing proposal Sorenson submitted demographic information for both communities. Sorenson asserts that the population served with the predicted 1.0 mV/m contour of an upgraded Station KWNG(FM), Red Wing, will increase the currently served population from 34,235 to 137,041, thereby serving an additional 102,806 persons. Sorenson states that while the upgrade at Chippewa Falls will increase the population served by a predicted 1.0 mV/m contour by 75,620 persons, from 102,849 to 178,469, a significant portion of that population would be located in Eau Claire, Wisconsin. Sorenson further asserts that the upgrade at Red Wing should prevail in view of the fact that Eau Claire is already well-served by a multitude of services. In addition, Sorenson states that Commission policy favors upgrades proposing to bring new service to a greater number of people, such as could be provided by the Red Wing proposal. Sorenson claims the upgrade at Red Wing would bring second FM service to a 1005 square mile area and to a population of 16,042. Sorenson claims on the other hand that the upgrade at Chippewa Falls would bring only a third FM service to a 41 square miles area and a population of 1,042.

3. The Chippewa Falls and Red Wing proposals are mutually exclusive because the communities are located approximately 87 kilometers apart, whereas 130 kilometers is required between Class C2 adjacent channels in accordance with Section 73.207 of the Commission's Rules. In an effort to provide both communities with their desired first wide coverage area FM service, an engineering study was conducted to determine if alternate channels were available to either community. The study concluded that the Channel 291C2 at Chippewa Falls and Channel 290C2 at Red Wing are the only available channels which can be allocated to either community. Therefore, these proposals must be comparatively considered. We are guided by the allocation priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982):

(1) first full-time aural service;

(2) second full-time aural service;

(3) first local service; and

(4) other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

4. Chippewa Falls (population 12,270),[5] in Chippewa County (population 52,127), is located in western Wisconsin approximately 147 kilometers (91 miles) east of Minneapolis, Minnesota. Chippewa Falls is currently served by the proponent's FM Station WCFW(FM) and fulltime AM Station WAYY. Red Wing (population 13,736), in Goodhue County (population 38,749), is located in southeastern Minnesota, approximately 75 kilometers (46 miles) southeast of Minneapolis. It currently receives local aural service from Station KWNG(FM) and fulltime AM Station KCUE.

5. Based on the aforementioned no first or second aural service, priorities (1) and (2), would be provided at either community. Therefore, under our listed priorities, we have determined that equal weight should be given to the proposals at Chippewa Falls and Red Wing. Thus, we shall turn to priority four, other public interest factors. Under priority four, we compare the extended service areas of each proposal. *See Greenup, Kentucky and Athens, Ohio, supra*. In applying the standard FCC methodology at the requested sites of each proposal, our staff engineering analysis conclude that the Red Wing proposal (290C2 for 288A) would result in a gain of 119,869 persons whereas the Chippewa Falls proposal (291C2 for 288A) would provide service to a population of 91,618 within its gain area. *See Stamps and Camden, Arkansas*, 3 FCC Rcd 3644 (1988). In view of the above stated determination, we find that the Red Wing upgrade will provide new service to a greater number of people and must be favored over the Chippewa Falls proposal. The Chippewa Falls proposal will, therefore, be denied.

6. Channel 290C2 can be substituted for Channel 288A at Red Wing in compliance with the Commission's minimum distance separation requirements with a site restriction of 23.5 kilometers (14.6 miles) east of the

community.[6] The site restriction is necessary in order to avoid short spacings to Station WEVR-FM, Channel 292A at River Falls, Wisconsin and vacant but applied for Channel 289A at Eden Prairie, Minnesota.[7]

7. We believe the public interest would be served by the channel substitution at Red Wing, Minnesota, providing that community an opportunity to receive its first wide coverage area FM station. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Red Wing, Minnesota	290C2

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KWNG(FM), IS MODIFIED, to specify operation on Channel 290C2 in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That the petition for rule making filed by Bushland Radio Specialities (RM-5851), IS DENIED.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 289A (871203MY) at Eden Prairie, Minnesota, as follows: Spacecom, Inc., 444 Pine Street, St. Paul, MN 55101.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Red Wing, Minnesota, has been added to the caption.

[2] MM Docket No. 87-306 addressed proposals pertaining to Albert Lea, Red Wing and Stewartville, Minnesota. We are able to address the upgrade request at Red Wing in the context of this proceeding without the consolidation of the instant proceeding with MM Docket No. 87-306, therefore, Sorenson's Motion to Consolidate IS DENIED.

[3] Public Notice of the counterproposal was given on October 16, 1987, Report No. 1685.

[4] Petitioner failed to request acceptance of its late-filed reply comments. The Commission had previously denied its request for extension of time. An *Order* denying the request for extension of time to file reply comments was released October 30, 1987 (DA 87-1577). Subsequently, petitioner filed two additional requests for extension of time. In accordance with the provisions of Section 1.46(a) of the Commission's Rules, the requests for extension of time ARE DENIED. Therefore, we consider all of the petitioner's late-filed submissions, as well as those tendered by Sorenson, to be unauthorized filings and no consideration will be given to the documents, in accordance with Section 1.415(d) of the Commission's Rules.

[5] Population figures are taken from the 1980 U.S. Census.

[6] The restricted site coordinates are 44-29-10 and 92-14-30.

[7] Sixteen applications are pending for the vacant channel at Eden Prairie, Minnesota. One of the applications is short-spaced to the site specified for the Red Wing proposal. Therefore, in accordance with Commission policy, the applicant Spacecom, Inc., will be required to amend its application to comply with the provisions of Section 73.207(b) of the Commission's Rules. *See Salamanca, New York and Bradford, Pennsylvania*, 50 FR 26208, June 25, 1985, and *Sanibel, Florida*, 50 FR 32706, August 14, 1985. "Cut-off" protection is afforded the applicant without loss of status since no upgrade in the class of channel will result.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-433

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, RM-6181
FM Broadcast Stations.
(Brookville and Punxsutawney, Pennsylvania) RM-5994

REQUEST FOR SUPPLEMENTAL INFORMATION

Adopted: August 29, 1988; Released: September 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Strattan Broadcasting (petitioner), the Commission issued the *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 6329 (1987), proposing the substitution of Channel 288B1 for Channel 240A at Brookville, Pennsylvania, and the modification of its license for Station WMKX to specify the higher powered channel. In addition, the *Notice* proposed the substitution of Channel 281A for Channel 288A at Punxsutawney, Pennsylvania, and the modification of the license of Renda Radio, Inc. (Renda) for Station WPXZ-FM to specify Channel 281A. Petitioner filed comments and reply comments supporting the allotment of Channel 288B1 to Brookville and supplemental comments proposing the allotment of Channel 277B1 to Brookville for use by other interested parties.[1] Genas Broadcasting (Genas) also filed comments supporting the allotment at Brookville and stated an intention to apply for the channel, if allotted. Renda filed comments opposing the Brookville upgrade and counterproposing instead the substitution of Channel 288B1 for Channel 288A at Punxsutawney and the modification of its license for Station WPXZ-FM to specify the higher powered channel.

2. This *Request for Supplemental Information* is being issued to elicit further information concerning the statement of intent to apply for Channel 288B1 at Brookville, Pennsylvania, if allotted, submitted by Genas. The allotment at Brookville requires that Station WPXZ-FM, Channel 288A, Punxsutawney, Pennsylvania, modify its operation to specify Channel 281A. While Genas stated an intention to apply for the channel, it failed to indicate an intention to reimburse the licensee of Station WPXZ-FM for the costs involved in the change of channel.[2]

THE PLEADINGS

3. Renda states that Punxsutawney and Brookville are located approximately 15 miles apart and that Station WPXZ-FM and Station WMKX are the only FM stations in Jefferson County. Further, Renda contends that both stations use the same programming format and are thus direct competitors for audience and revenue. It argues that its counterproposal should prevail based on the priorities set forth in *Revision of FM Assignment Policies and Procedures (Revision)*, 90 FCC 2d 88 (1982).[3] Renda claims that Punxsutawney is more deserving of a first wide coverage area service based on its larger population (7,479 vs. 4,568, 1980 U.S. Census). It also states that, according to the Punxsutawney Chamber of Commerce, the area surrounding Brookville is not growing as rapidly as the area around Punxsutawney. Finally, it states that the allocation of Channel 288B1 to Punxsutawney would "facilitate" improved service to underserved areas.

4. In response, petitioner states that Renda's counterproposal would violate Section 73.315 of the Commission's Rules and Section 77.23(a)(1) of the Federal Aviation Administration's (FAA) Rules. Renda proposes a transmitter site approximately 20.7 kilometers north-northwest of Punxsutawney in order to meet spacing requirements to other nearby stations. From this assumed transmitter site, Renda proposes to utilize an antenna 563 feet above ground level (AGL). However, based on a study by John P. Allen, an Airspace Consultant, petitioner states that Renda's proposal would not comply with Section 77.23(a)(1) of the FAA's rules which limit antenna towers to 500 feet AGL in areas located within a Visual Flight Rule (VFR) Route. According to petitioner, Renda's proposal would interfere with VFR en route navigation since the proposed transmitter site is within two statute miles of Federal Airway V6-30, a potential visual flight rule route. Further, should Renda attempt to avoid FAA problems by reducing its antenna height to 500 feet, petitioner states that the proposal would then violate Section 73.315(b) of the Commission's Rules concerning city-grade coverage. Specifically, petitioner states that a tower height of 500 feet above ground would not provide line-of-sight to any portion of Punxsutawney due to major terrain obstructions and that an antenna height in excess of 800 feet AGL would be required to provide even a small portion of Punxsutawney with the required line-of-sight service.

5. Petitioner contends that Brookville has a greater need for the wide area coverage service. It states that Brookville is the seat and commercial hub of Jefferson County. Should a comparison of the two communities be required, petitioner provides information concerning relative population growth, household incomes and employment opportunities.

DISCUSSION

6. In reviewing the proposals before us, we find that a comparison of the two communities is not necessary. Channel 288B1 cannot be allocated to Punxsutawney in compliance with Commission regulations. We have confirmed that use of Channel 288B1 at Renda's proposed transmitter site with an antenna height of 563 feet AGL would not provide line-of-sight coverage to Punxsutawney and could also violate FAA air hazard requirements.

7. We believe the public interest would be served by allotting Channel 288B1 to Brookville, Pennsylvania, since it could provide the community and its environs with expanded radio service, and by substituting Channel 281A for Channel 288A at Punxsutawney, Pennsylvania. We find that Renda has not shown good cause why its license for Station WPXZ-FM should not be modified to specify Channel 281A. However, absent further information from

Genas, we are unable to determine whether petitioner's license for Channel 240A can be modified to specify operation on Channel 288B1 at Brookville.

8. Section 1.420 of the Commission's Rules stipulates that a station's license may be modified in rule making to specify a non-adjacent higher powered channel if no other timely expression of interest is filed or if there is an additional equivalent channel available for use by such interested parties. Here, a timely expression of interest was filed by Genas and we are unaware of an additional equivalent channel to accommodate its interest. We recognize that petitioner stated an intention to reimburse Renda for the costs involved in its change of channel. However, we believe that the commitment is premised upon the modification of Station WMKX to specify operation on Channel 288B1. Genas has not stated an intent to reimburse Renda. Therefore, we find that no final decision can be made without first determining Genas' intention as to the reimbursement issue.

9. To avoid this type of delay in future proceedings, we are taking this opportunity to state our policy concerning the content of competing expressions of interest. When a party files a competing expression of interest in a non-adjacent upgrade proceeding, the party expressing the interest must serve a copy of its comments on the petitioner and must include a certificate of service with its pleading. *See* Section 1.420 of the Commission's Rules and paragraph 4 of the Appendix attached to all Notices of Proposed Rule Making. Pleadings filed in an allotment proceeding which do not comply with these requirements will be deemed unacceptable and will not be considered. *See, e.g., Lebanon and Bolivar, Missouri*, 2 FCC Rcd 6786, n. 3 (1987). Further, where, as here, the allotment of a channel requires an existing station to modify its operation by specifying a new channel, it is well established Commission policy that licensees and/or permittees required to change channels so as to allow a new allotment elsewhere are entitled to reimbursement. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Therefore, parties filing competing expressions of interest in cases which require channel changes by existing licensees to accommodate the new allotment are also required to state an intention to reimburse the affected parties. The absence of such a statement will render the expression of interest invalid. These policies will apply to all proceedings where the Notice of Proposed Rule Making is adopted after the adoption of this *Request for Supplemental Information*.

10. No additional competing expressions of interest in use of Channel 288B1 at Brookville or counterproposals to its allotment will be accepted since an opportunity for the filing of such interest and/or counterproposals has already been provided. Should Genas fail to explicitly state an intention to reimburse Renda for the costs involved in its change of channel, we shall issue a Report and Order allotting the channel and modifying petitioner's license accordingly.

11. Interested parties may file comments on or before **November 10, 1988,** and reply comments on or before **December 12, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert L. Olender, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
2033 M Street, N.W., Suite 203
Washington, D.C. 20036
(Counsel to petitioner)

Irving Gastfreund, Esq.
Kaye, Scholer, Fierman, Hays & Handler
1575 Eye Street, N.W.
Washington, D.C. 20036
(Counsel to Renda Radio)

Mr. Joseph Nascone
Genas Broadcasting, Inc.
817 Elm Spring Road
Pittsburg, Pennsylvania 15243

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Channel 277B1 cannot be allotted to Brookville in compliance with the Commission's minimum distance separation requirements. The allotment of Channel 277B1 requires several channel substitutions, one of which is the substitution of Channel 228A

for Channel 223A at Barnsboro, Pennsylvania, allotted in MM Docket 84-231, for which there is a pending application (ARN-871124MS, Bland Group). Our engineering review shows that the use of Channel 228A at the applied-for site would be five kilometers short-spaced to Station WBZZ, Pittsburgh, Pennsylvania.

[2] By letter of April 13, 1988, the Commission informed the parties to this proceeding that the Genas pleading was considered to be an *ex parte* pleading in that there was no indication that it had served the petitioner with a copy of its comments. However, by letter of May 6, 1988, Genas stated that it had complied with the service requirements even though it had failed to incorporate that information in its comments. Based on its representation that it had served a copy of its comments on the petitioner, we will accept its comments for consideration herein.

[3] The priorities set forth therein are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-383

In the Matter of

Amendment of Section 73.202(b),	RM-5933
Table of Allotments,	
FM Broadcast Stations.	
(Crockett, Texas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted; August 30, 1988 Released: September 19, 1988

By the Deputy Chief, Policy and Rules Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 5862 (1987), issued at the request of B.S.T. Broadcasting, Inc. (petitioner), licensee of Station KBHT(FM),[1] Channel 228A, Crockett, Texas, proposing the substitution of Channel 228C2 for Channel 228A and modification of its license to specify operation on the higher class frequency.[2] Petitioner filed supporting comments reaffirming its intention to effectuate the changes in its facilities. Other comments were filed by Hicks Broadcasting Corporation (Hicks), licensee of Station KYKR(FM) at Port Arthur, Texas, to which petitioner responded. [3]

2. Hicks, in its comments, raises no objection to the grant of the proposal, but rather requests the imposition of a site restriction 19.5 kilometers north-northwest of Crockett for Channel 228C2. Hicks asserts that the restriction is necessary in order to protect its application for a change in transmitter site for Station KYKR(FM). Hicks states that it wishes to co-locate its transmitter site on a tower to be constructed by the licensee of Station KHYS(FM) at Port Arthur. Hicks alleges that the co-location would minimize FAA and environmental concerns while permitting it to retain its full class "C" status.[4]

3. Petitioner contends that it may effectuate the proposed upgrade at Crockett without relocating its current transmitter site. It asserts that protection of the construction permit for Station KYKR(FM), as stated in the *Notice* is not necessary since the permit has expired. Petitioner opposes Hicks' request to impose a 19.5 kilometer site restriction on the new channel. Further, petitioner states that the proposed site restriction would "render the upgrade technically uncertain and ruinously expensive."

4. We have carefully considered all the information herein and conclude that the public interest would be served by substituting Channel 228C2 for Channel 228A at Crockett, Texas, as that community's first wide coverage area FM service.[5] The channel substitution can be made in compliance with the Commission's minimum separation requirements.[6]

5. In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KBHT(FM) to specify operation on Channel 228C2.

6. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Crockett, Texas	224A, 228C2

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KBHT(FM), Crockett, Texas IS MODIFIED, to specify operation on Channel 228C2 in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. Questions related to the application process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-6908.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Formerly KCKR(FM).

[2] The proposal was originally requested by Norman Fischer, Receiver, and by the petitioner, then the proposed assignee.

[3] We have not considered a supplement to reply comments submitted by petitioner approximately seven months after the pleading cycle in accordance with Section 1.415(d) of the Commission's Rules.

[4] Station KYKR(FM) is currently licensed as a Class C1 facility. There is pending before the Commission an application which would permit Station KYKR(FM) to retain its full class C status. However, the application submitted March 2, 1987, and subsequently amended, specified a transmitter site was 52.7 kilometers from its current licensed site (BMPH-870302MJ). The site specified in the pending application exceeds the 10 kilometer buffer zone protection. Therefore, the application is not protected against a new proposed allotment. *See* Public Notice, FCC 87-93, released March 24, 1987.

[5] In a separate proceeding the Commission is considering a proposal to upgrade Channel 224A to Channel 224C2 at Crockett. *See* MM Docket No. 88-197, 3 FCC Rcd 2796 (1987).

[6] Petitioner's current transmitter site can be used for the substitution of Channel 228C2. The coordinates are 31-17-33 and 95-28-20. Initially, there was a short spacing of 1.2 kilometers to the protected site specified in the construction permit for Station KYKR(FM) at Port Arthur, which would have required the relocation of petitioner's current transmitter site. However, we note that the authorization for the construction permit at Port Arthur (BPH-831114AZ) expired on January 23, 1986, the Commission subsequently cancelled the construction permit. Therefore, the petitioner's current transmitter site may now be used.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-174

In the Matter of

Amendment of Section 73.202(b), RM-5465
Table of Allotments,
FM Broadcast Stations.
(Glenwood Springs, Colorado)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 19, 1988; Released: September 19, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration of the *Report and Order*, 3 FCC Rcd 613 (1988), which substituted FM Channel 255C2 for Channel 224A at Glenwood Springs, Colorado, and modified the license of Station KMTS-FM to operate on Channel 255C2. The Petition was filed by Whale Communications of Colorado, Inc. (Whale), licensee of Station KKMG(FM), Channel 255C1, Pueblo, Colorado.

2. In adopting the proposal for Channel 255C2, filed by Colorado West Broadcasting, Inc. (Colorado West), we noted in the *Report and Order* that subsequent to the *Notice of Proposed Rule Making*, 2 FCC Rcd 3424 (1987) (*Notice*), adopted in the instant proceeding, an application was filed by Whale to relocate its transmitter in order to upgrade its operation on Channel 255 to a full Class C facility. Whale's application conflicted with the Glenwood Springs proposal because Class C to C2 co-channels must be separated by a distance of 249 kilometers. However, the distance between Channel 255C2 in Pueblo and 255C2 in Glenwood Springs was only 231 kilometers. Next, we indicated that Whale's proposal was not entitled to protection under the Commission's "buffer zone" policies since the application of Station KKMG(FM) was filed after the expiration of the "buffer" period.[1] We further indicated that the site specified by Whale would not be preferred over Colorado West's proposal in the allotment proceeding, citing *Andalusia, AL*, 49 FR 32201, August 13, 1984.[2]

3. In its Petition for Reconsideration, Whale requests that the Commission reconsider its action in this proceeding and specify the allotment of either Channel 256C2 or 256C1 to Glenwood Springs, Colorado, in lieu of Channel 255C2, and modify the license of Station KMTS-FM in accordance with the preference of the licensee. Whale states that the transmitter site specified in its application cannot be easily relocated, because it is at a preferred site in an antenna farm located at Cheyenne Mountain. In order to meet the spacing requirements imposed by the allotment of Channel 255C2 to Glenwood Springs, Whale states that it would have to relocate its transmitter site at least 18 kilometers southeast of the site now proposed, precluding use of the antenna farm at Cheyenne Mountain. Whale claims that it was not aware of the conflict which was posed by Colorado West's proposal and its pending application until the Commission's *Report and Order* was released. Otherwise, Whale claims, it would have filed comments seeking the specification of another channel at Glenwood Springs so as not to interfere with the use licensed to Whale in Pueblo.

4. In order to resolve the conflict, Whale contends that Channel 256 is available for allotment to Glenwood Springs for use by Colorado West, which will enable KMTS-FM to operate as a Class C2 station without being short spaced with the pending KKMG application. Whale further contends that Channel 256 would also support both Class C2 or Class C1 operation by KMTS-FM while the station is blocked by the proximity of KKMG from ever attaining Class C1 status on Channel 255. Lastly, Whale states that no change in the Glenwood Springs site specified in the *Report and Order* would be required for the station to operate either as a Class C2 or Class C1 station on Channel 256.

5. Whale concludes that the allotment of Channel 256 to Glenwood Springs will permit the upgrade of KMTS-FM without affecting the pending KKMG proposal and that the public interest will be advanced through the grant of this request, as both the Glenwood Springs market and the Pueblo-Colorado Springs market will realize improved FM service.

6. Colorado West initially filed comments opposing Whale's proposal. However, Colorado West subsequently withdrew its objections to the proposal and now supports the allotment of Channel 256C2 instead of Channel 255C2 to Glenwood Springs.

7. In light of the above, we believe that Whale's petition for reconsideration should be granted. As correctly noted by Whale, Channel 256C2 can also be allotted to Glenwood Springs instead of Channel 255C2, consistent with the Commission's minimum distance spacing requirements. Since Colorado West has withdrawn any objections to the proposed allotment and now supports Whale's request, we believe it would be in the public interest to grant the proposal. Moreover, the allotment of Channel 256C2 to Glenwood Springs will make it possible for Channel 255C to be utilized at Pueblo, Colorado.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED as follows:

City	Channel No.
Glenwood Springs, Colorado	256C2

9. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station KMTS-FM, Glenwood Springs, Colorado, IS MODIFIED TO SPECIFY operation on Channel 256C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That, the Secretary of the Commission SHALL SEND a copy of this Order by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Colorado West Broadcasting, Inc., 1322-1/2 Grand Ave., Glenwood Springs, CO 81601.

11. IT IS FURTHER ORDERED, That, the Secretary of the Commission SHALL ALSO SEND a copy of this Order by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee of Station KKMG(FM), Pueblo, Colorado, as follows: Whale Communications of Colorado, Inc., 44 E. Spaulding, Pueblo, CO 81007.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The 16 kilometer "buffer zone" protection established for existing Class C stations expired on March 2, 1987. After that time, all channels were reclassified to operating parameters pursuant to BC Docket 80-90. *Reconsideration of Docket 80 - 90, Memorandum Opinion and Order,* 97 FCC 2d 279 (1984), *See also, Public Notice,* 3775, April 9, 1985.

[2] In *Andalusia* the Commission held that an applied for, but unauthorized transmitter site generally reflects a preference for a particular location and thus is not favored over the provision of a new service.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-438

In re Applications of

PORT HURON FAMILY RADIO, INC.	File No. BPH-830325AE
L & K BROADCASTING, INC.	File No. BPH-830714AC

For Construction Permit for a New FM Station, Port Huron, Michigan

Appearances

Morton L. Berfield and *Roy W. Boyce* on behalf of Port Huron Family Radio, Inc.; *Martin Leader, Clifford M. Harrington, David D. Oxenford*, and *Jonathan W. Emord* on behalf of L & K Broadcasting, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: September 9, 1988; Released: September 16, 1988

1. On November 5, 1986, the Chief, Audio Services Division, Mass Media Bureau designated these mutually exclusive FM broadcast applications for hearing. 51 Fed. Reg. 43,786 (1986). The following issues will be considered in this decision:

(1) To determine whether the proposal of Port Huron Family Radio, Inc. would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

(2) To determine whether L & K has reasonable assurance that the transmitter site specified will be available to it.

(3) (a) To determine whether Port Huron Family Radio, Inc. gave untruthful answers to the financial qualifications questions in completing Form 301.

(b) To determine whether Port Huron Family Radio is financially qualified.

(c) To determine from the evidence adduced on these issues whether Port Huron Family is qualified to become a broadcast licensee.

(4) To determine which proposal would, on a comparative basis, best serve the public interest.

(5) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. A prehearing conference was held on January 30, 1987, hearing sessions were held on April 27 and 28, 1987. The record was closed on April 28, 1987. *Order*, FCC 87M-937, released April 30, 1987. An additional issue was designated on August 25, 1987, *Memorandum Opinion and Order*, FCC 87M-2022, released August 27, 1987, a hearing session on that issue was held on November 2, 1987, and the record was again closed on November 2, 1987. Tr. 619. Proposed findings of fact and conclusions of law were filed by the applicants and the Mass Media Bureau on June 22, 1987, replies were filed by the applicants on July 20, 1987, supplemental findings and conclusions were filed by the applicants on December 3, 1987, and replies were filed by the applicants on December 14, 1987.

FINDINGS OF FACT

Port Huron Family's City Grade Coverage

3. When this case was designated for hearing the Mass Media Bureau pointed out that Family claimed it would serve 98.2% of the land area of Port Huron with its 70 dBu contour. Family requested a waiver of 47 C.F.R. §73.315, but the Bureau was unable to consider that request because it could not verify Family's coverage claim. The Bureau found that the coverage map provided by Family was inadequate and it failed to provide population information about its coverage.

4. Family submitted, as its Exhibit 8, a verified map of Port Huron. The parties stipulated that Family will not cover 595 people, or 1.75% of Port Huron's population and that the area covered is as Family claimed 98.2%. Stipulation, filed May 1, 1987.[1]

L & K's Assurance for Its Antenna Site

5. On July 14, 1983, L & K filed its application in which it designated an antenna site located at 43 degrees 01' 03" North Latitude, 82 degrees 26' 45" West Longitude. The proposed tower was to be 365 feet above ground, with guy wires, which would require four to five acres of land. Family Exhs. 10, 13; Tr. 275, 289-91. Over two years afterward, before designation of the applications for hearing, on November 11, 1985, L & K proposed changing sites. The filing for the new site included the statement of Kenneth A. Monicatti, an officer and 30% stock subscriber in L & K; Mr. Monicatti explained that he selected the original site. Family Exh. 12. He represented that he visited areas suitable for the proposed antenna and found "For Sale" signs on property he believed suitable. *Id.* Mr. Monicatti told the Bureau he assumed that because the land was for sale it was available to him. *Id.* He said he did not know that he did not have reasonable assurance. He explained that when he tried to get assurance for the designated site, he found out he could not rely on the site being available. *Id.* The Mass Media Bureau concluded, that, in light of L & K's admission, it never had reasonable assurance for its designated antenna site and it had not established good cause for moving to a new site. *HDO*, at ¶ 36. When L & K filed its application, Mr. Monicatti said that Washington communications counsel told him

that all he needed was an available site and, if the site became unavailable, L & K would be allowed to move to another site. Tr. 260-61.

6. Two years after conceding that it did not have reasonable assurance, L & K submitted, on April 16, 1987, testimony by Mr. Monicatti in which he said that the owner was interested in leasing some of the property at the designated site. L & K Exh. 6, at 5. He submitted as part of his testimony a 90 day option agreement for "Property A." L & K Exh. 6, Attachment. Mr. Monicatti explained that he was still of the understanding that a site location could be designated if the land was available and, if it was sold, then the applicant could move to a new site. L & K Exh. 6, at 1; Tr. 260-63. Despite L & K's difficulties, he still believes that to be the case. Tr. 263-64.

7. Mr. Monicatti testified that in March 1983, when he was looking for a site, he spoke with Wynn Cooper, a Port Huron real estate broker, who listed 9 acres for sale at the designated site. L & K Exh. 6, at 1-2. Mr. Monicatti concedes, however, that he took no steps to arrange to buy or lease the land; he did not contact the owner and he did not ask Mr. Cooper to do so for him. Tr. 265-70. He did not talk with Mr. Cooper about whether the land would continue to be available. Tr. 269-70. Moreover, he never checked back with Mr. Cooper during 1983, 1984 or 1985 to see if the land was still available. Tr. 275-77. Mr. Monicatti claims that he did not tell the Bureau about his discussion with Mr. Cooper because he forgot about it. Tr. 288.

8. Mr. Monicatti stated that, between August and November 1985, he "discovered that the property did not seem to be for sale any longer." L & K Exh. 6, at 4. When examined about that statement, he admitted that he had not reached that conclusion by contacting the land owner (he did not know, in November 1985, who owned the land) but he noticed that condominiums were being constructed on the site, which, he then believed, made putting an antenna there impossible. Tr. 282.

9. Mr. Monicatti initially testified that Property A on which L & K held a 90 day option was the "original transmitter site." L & K Exh. 6, at 5. Both L & K's counsel and Mr. Monicatti stated that Property A was the same site. Tr. 161, 286. John C. Niederhauser, a Registered Land Surveyor, stated, however, that the original coordinates were located where condominiums now stand and that Property A, the optioned site, is a nearby strip of land 100 feet by 450 feet which is bounded on the east and west by office buildings, on the north by the condominiums, and on the south by the public street, Holland Avenue. Family Exh. 13. Mr. Niederhauser explained that the center point of the area would have coordinates of 43-01-00, 82-26-46. *Id.* Mr. Niederhauser also urged that a Port Huron ordinance would have required that the tower be set back from the street and adjacent property by a distance equal to the tower's height. Family Exh. 13, at 1-3. In the face of the surveyor's affidavit, Mr. Monicatti was evasive about whether his hearing site proposal was different. When confronted, he was also evasive about what he originally told L & K's engineer about where the tower could be located. Tr. 272-73.

10. Mr. Monicatti, when faced with Mr. Niederhauser's report, conceded that Property A was not the place he originally intended to put the tower; that location, he agreed, was now occupied by condominiums. Tr. 290-93. Moreover, he admitted that Property A was not the five acres he originally said he needed, but only one acre, and that the office buildings adjacent to Property A were there in 1983. He never asked L & K's consulting engineer whether the coordinates had changed, he never inquired about the set-back ordinance, and he never asked anyone whether Property A could be used for the intended purpose. Tr. 296-300. On September 8, 1987, L & K Broadcasting extended the Property A option and on January 7, 1988 the landowner cancelled the option. Petition for Leave to File Section 1.65 Amendment, filed January 7, 1988 by L & K Broadcasting; Statement for the Record, filed September 8, 1987.

Family's Financial Qualifications

11. During the hearing sessions in April 1987, Martin Doorn, who is Family's secretary, 20% owner, a director, and the proposed general manager of the station, testified that Family relies on George Clark, who has no interest in Family but is a close friend of Mr. Doorn, for all of its financing. From Mr. Doorn's testimony, it appeared that Family had no formal agreement with Mr. Clark and, it appeared that it had not determined whether Mr. Clark could provide the needed money; there existed the possibility that Family had falsely certified its financial qualifications and that it was financially unqualified. *Memorandum Opinion and Order*, FCC 87M-2022, released August 27, 1987, at ¶ s 4-6.

12. Mr. Doorn had certified for Family that it was financially qualified in March 1983. Family Exh. 14, at 2. Before certifying, Mr. Doorn asked Roger Gardner, in early March 1983, to develop cost figures for construction and the first three months of operation of Family's proposal. Family Exh. 14, at 2; Exh. 15, at 2. Mr. Gardner, an accountant, reviewed the Commission's requirements, spoke with Mr. Doorn about staff plans, equipment suppliers about equipment and tower costs, and Paul Stewart, a Grand Rapids, Michigan radio consultant, about appropriate estimates. Family Exh. 15, at 2; Tr. 559. In addition, he spoke with a Grand Rapids accounting firm that did broadcast accounting about operating costs. He estimated Family would need 168,867. Mr. Gardner then told Mr. Doorn that about 30,000 more than the estimate would be needed to prosecute the application, which brought the total needed to 200,000. Family Exh. 14, at 2; Exh. 15, at 2-4.

13. Mr. Doorn said that Family relies on George Clark, longtime close friend of his, to provide the money. Family Exh. 14, at 2-3; Exh. 16, at 2; Tr. 497-98, 514. Mr. Doorn is the minister of the Northgate Bible Church and Mr. Clark has financed many projects for the church. Within the last year, he donated 30,000 to the church. Family Exh. 14, at 3; Exh. 16, at 2; Tr. 496. Mr. Clark has told Mr. Doorn that he will help him financially and, in the past, he has. Family Exh. 16, at 2; Tr. 498. Mr. Doorn asked Mr. Clark, before certifying that Family was financially qualified, if he would provide the 200,000 and he said he would. Mr. Clark wanted repayment only if Family received a grant and operated the station. Mr. Clark said he expected no interest or collateral and because of his longtime friendship with Mr. Clark, his agreement to lend was oral. Family Exh. 14, at 3-4; Exh. 16, at 2-3; Tr. 501, 506, 512. Mr. Clark said he frequently commits large sums of money to business transactions by oral agreement. Tr. 458-59, 462-64.

14. Mr. Doorn believed Mr. Clark reliable but he also discussed Mr. Clark's finances with Mr. Gardner, who prepared Mr. Clark's tax returns and knew about his

finances. Mr. Gardner told Mr. Doorn he could certify that Mr. Clark was capable of financing the proposal. Family Exh. 14, at 4; Exh. 15, at 3; Tr. 571, 577-78, 586-89. Mr. Clark has already advanced 49,111 and, because of additional expenses for litigation and because so much time has passed, Family estimates it will need about 210,000, instead of 200,000. Mr. Clark has now agreed to provide 250,000. Family Exh. 14, at 4-5; Exh. 15, at 2-21; Exh. 16, at 3. Mr. Clark's current balance sheet shows a net worth of 900,000 and an annual income of 350,000. Family Exh. 16, Mr. Clark has obtained a letter of credit from the Commercial and Savings Bank of St. Clair County to provide 250,000 to him for Family's FM proposal. Family has obtained a letter from Peoples Bank of Port Huron which promises to provide 200,000 to Family. Family stockholders have agreed to the bank's terms. Family Exh. 14, at 5-8.

Comparative Proposals

Family

15. Family is a stock corporation with voting and non-voting stock. Only common voting stock has been issued. Family Exh. 1, at 1. Family has no mass media interests and neither do its shareholders. Family Exh. 1, at 1. Martin Doorn, who is secretary, director, and 20% stockholder of Family, proposes to become the general manager of the station. Family Exh. 2, at 1. He will work full time, 40 hours per week at the station. In his position he will coordinate all station departments. *Id.* Mr. Doorn has lived in Port Huron since 1976, his home is within the proposed 1 mVm contour. *Id.* He is currently Pastor of Northgate Bible Church but he would resign if a grant is made. *Id.* Since 1984, he has belonged to and been president of the Port Huron chapter of the Community Federation of Decency and, since 1976, he has been a member of the Evangelical Ministerial Association of St. Clair County. Family Exh. 2, at 2. He has been president of the association since 1984. From 1979 to 1982, Mr. Doorn hosted a weekly half hour local radio program presented by his church. Since 1983, he has been the host on a local half-hour cable show produced by his church. Family Exh. 2, at 2. Mr. Doorn would not continue that program if Family's application is granted. Tr. 65-66.

16. Martin Doorn has been the moving force behind Family's proposal. He has prosecuted the application. Tr. 51-53. He located the transmitter site, obtained its use, arranged for public notice of the proposal and proceeding, directed settlement negotiations, signed documents on behalf of Family, and arranged financing. Tr. 51-54. The other Family stockholders have permitted and authorized Mr. Doorn to take these actions without consulting them. Tr. 52-53, 54, 110.

17. Arthur Margerm, who will work at the station as the full-time, 40 hours per week, program director, is president, a director, and 20% stockholder of Family. Family Exh. 3, at 1. He has lived in Port Huron since 1979. At the station he will develop and supervise programming and supervise programming personnel. Family Exh. 3, at 1. Mr. Margerm belongs to the Foursquare Sportsmen, a Port Huron fraternal organization and he was secretary of that organization from 1974 to 1984. He also has been a leader in local church activities. He has worked at the church's Sunday school and in its youth activities. Family Exh. 3, at 1-2.

18. R. Joseph Krenke, who is a 20% stockholder and a director in Family, will be director of operations and music director at the station. Family Exh. 4, at 1. Mr. Krenke will supervise the acquisition, installation, and operation of the station's technical and studio facilities. *Id.* He will develop and supervise the music programming of the station. *Id.* In his job, he will work full time, 40 hours per week. Mr. Krenke has lived in Port Huron from 1947 to 1968 and from 1972 to present. In 1987, his job with Motorola required that he work in Lansing, Michigan and he now spends only weekends in Port Huron. *Id.* From 1975-78, Mr. Krenke belonged to the Evening Optimists Club in Port Huron. Family Exh. 4, at 2. In 1977, he was its president and in 1976 he was vice president. *Id.*

19. Avalon Peterson will be the business manager and director of women's programming on a full-time, 40 hours per week, basis. Family Exh. 5, at 1. She will develop and supervise programming of interest to women. *Id.* In addition, she will be responsible for all fiscal matters at the station, including budgeting. *Id.* Ms. Peterson has lived in Port Huron since 1954. She is female. She is active in her church where she has a leadership role. *Id.* Ms. Peterson is a director, 20% stockholder, and treasurer of Family. Family Exh. 5, at 1.

20. Armstead Diggs, who is a 20% stockholder and director of Family, will work at the station as the sales manager and director of minority programming on a full-time, 40 hours per week, basis. Family Exh.6, at 1. He will be responsible for supervising, directing, and developing sales. *Id.* He will also be responsible for developing and supervising programs for minorities. Family Exh. 6, at 1. Mr. Diggs will spend 75-80% of his time in sales supervision and selling time. Tr. 147, 149.

21. Mr. Diggs has lived in Port Huron since 1952 and he has participated in civic activities. He has belonged to the NAACP, Port Huron chapter, since 1955. Currently he is its youth director and responsible for voter registration. Family Exh. 6, at 1-2. From 1959-60, he belonged to Big Brothers, from 1965-73, he belonged to Port Huron Junior Chamber of Commerce. He has been a member of the Port Huron Public Library Board. For eight years he was a director on the Board of Catholic Social Services; since 1980, he has been chairperson of the Shiloh Missionary Baptist Church Board, and he has been a church deacon since 1972. Family Exh. 6, at 2. Mr. Diggs is black. *Id.*, at 1.

L & K

22. Linda K. Monicatti, who is president, a director, and stock subscriber to 1500 shares (60% of the subscribed shares), will be the station's general manager. L & K Exhs. 1 and 2, at 1. She will supervise the business and operational activities of the station on a full-time basis. L & K Exh. 2, at 1. Linda Monicatti owns an advertising agency, the All Season Agency, Inc. Her spouse, Kenneth A. Monicatti is the agency's general manager. L & K Exh. 2, at 2, Exh. 3, at 2. That agency primarily produces for commercial clients educational materials and programs to be presented at schools. L & K Exh. 2, at 2. Ms. Monicatti lives in Romeo, Michigan, but she and her spouse represented that they would have a residence in Port Huron and in Romeo. Ms. Monicatti said that they intend to keep their house in Romeo because their advertising agency business is located in their home there. She said that the distance between Romeo and Port Huron could be driven in 40 minutes and is an easy commute. Tr. 345-46. Ms. Mon-

icatti is female. Ms. Monicatti proposes to leave her other jobs but she would continue to work 10 hours per week at the agency in Romeo. L & K Exh. 2, at 2.

23. Kenneth A. Monicatti, who is secretary-treasurer, a director, and subscriber to 750 shares (30% of the subscribed shares), will be the full-time, 40 hours per week, sales manager at the station. L & K Exh. 3, at 1. Mr. Monicatti will implement the advertising sales program. *Id.* He lives in Romeo, Michigan but would establish another residence in Port Huron. *Id.* Mr. Monicatti will continue to work 10 hours per week in his spouse's agency. *Id*, at 3.

24. Mr. Monicatti, from January 1983 to October 1985, managed a company called New Tower, Inc. which constructed a broadcast tower for WABX (WCLS), Detroit. L & K Exh. 3, at 2. During that time, for eight months he managed the station, first as station manager for five months and then as general manager for three months. Tr. 321. For the remaining time he only managed the tower site. Tr. 321-22.

25. Florrid E. Little, Jr., who is vice president, director and subscriber to 250 shares (10% of the shares subscribed), proposes to work full time, 40 hours per week, as the program director. L & K Exh. 4, at 1. He will select the programming. *Id.* Mr. Little would move to Port Huron. *Id.* ; Tr. 361. Mr. Little worked part-time at WKAR, a campus station from 1974 to 1978. L & K Exh. 4, at 2-3. In July 1977, he began working as an announcer at WAMM (AM); he worked at that station until 1981. *Id.* From January 1981 to November 1981, he worked full time at WDKX(FM) as music director. Beginning in October 1982 to April 1983, he was music director at cable video station WLAN. *Id.* Thereafter, during 1983-84, he worked at WFMK(FM) and, in 1985, he worked at WEYI(TV) and WGMZ/WWCK. *Id.* Mr. Little has sometimes been a supervisor at the stations that employed him. He is black.

Auxiliary Power

26. L & K proposes auxiliary power. L & K Exh. 5.

Comparative Coverage

27. The following data is from L & K Exhibit 7. Family withdrew its comparative coverage exhibit and it relies on L & K Exhibit 7. The coverage information for L & K is from the site it originally designated in 1983.

Applicant	Area (square kilometers)	Population
Family	882.1	86,407
L & K	745.9	87,628

28. Neither applicant proposes to serve any white area, which is an area presently receiving no daytime or nighttime aural service. The applicants propose to serve the following areas and populations presently receiving one, two, three or four aural services:

Second Service to be Provided

Applicant	Area (square kilometers)	Population
Family	3.96	241
L & K	0	0

Third Service to be Provided

Applicant	Area (square kilometers)	Population
Family	1	20
L & K	0	0

Fourth Service to be Provided

Applicant	Area (square kilometers)	Population
Family	145.8	2,256
L & K	0.8	149

Fifth Service to be Provided

Applicant	Area (square kilometers)	Population
Family	19.4	175
L & K	59.8	6,433

29. Family's proposed city grade signal (3.16 mVm) will encompass 98.25% of the area of Port Huron, Michigan, and 98.25% of that city's population. Joint Stipulation filed May 1, 1987.

CONCLUSIONS

Family's City Coverage Proposal

30. When these applications were designated for hearing, the Mass Media Bureau could not determine whether Family's waiver request of the city grade coverage rule could be granted because all of the necessary information had not been provided by Family. That information is now part of the record. Family will reach 98.2% of the land area of Port Huron with its city grade signal and 98.25% of the population. "[T]he Commission no longer requires a waiver of 47 C.F.R. §73.315(a) when more than 80% of the community of license will be served within the 3.16 mV/m contour. *See John R. Hughes, Inc.*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920 HVT)." *Mary C. Murray*, 53 Fed. Reg. 18342 (1988). Family more than meets the existing standard for coverage pursuant to § 73.315(a) and, therefore, a waiver is unnecessary.

L & K's Assurance for Its Proposed Transmitter Site

31. The instructions to FCC Form 301 provide that:

> An applicant need not have a binding agreement or absolute assurance of the availability of the transmitter site it proposes to utilize. However, the applicant must be able to show that it has obtained reasonable assurance that the proposed site is available to it. The Commission's requirements will be satisfied where an applicant has contacted the property owner or the owner's representative and has obtained reasonable assurance, in good faith, that the proposed site will be available for the intended purpose.

32. There must be some "indication of the property owner's favorable disposition toward making an arrangement with the applicant, beyond simply a mere possibility.

. . . This reasonable assurance may be acquired by informal telephone contacts by counsel for the applicant and rent and other details may be negotiated at a yet undetermined future date." *National Innovative Programming Network, Inc. of the East Coast*, 2 F.C.C. Rcd 5641, 5643, *citing Puopolo Communications, Inc.*, 60 Rad. Reg. (P & F) 2d 964 (Rev. Bd. 1986). The applicant must have obtained sufficient assurances to justify a belief that the site is suitable and available until advised otherwise. *Id.* The Commission points out that an applicant would not have reasonable assurance where it did not contact the site owner until more than a year after compiling its application. *Id.* at n. 4, *citing William F. and Anne K. Wallace*, 49 F.C.C. 2d 1424 (Rev. Bd. 1974).

33. In addition, the Commission cautions each applicant that its "statements regarding sites constitute representations on which the FCC will rely in considering the application." Forms Rad. Reg. (P & F) 98:301-1 (1987). Replies to questions should, therefore, accurately reflect the applicant's responsible consideration of the questions asked. *Id.*

34. The L & K principal who was responsible for locating site for its tower was Kenneth A. Monicatti. Mr. Monicatti was familiar with the problems of constructing a tower and he understood that there might be local setback restrictions on locating the tower on a site. L & K filed its application on July 14, 1983 and, in January 1983, Mr. Monicatti became the site manager for the tower of Detroit broadcast station WABX, now WCLS. He supervised the tower's construction and then maintained the site for the owner, New Tower, Inc. While he was constructing the tower for WBAX, Mr. Monicatti undertook locating a site for L & K's proposal for Port Huron. He initially told the Commission that in February, or early March 1983 he located an antenna site in Port Huron by finding an appropriate location. That site could be used, he said, because he observed that there was a sale sign on the land. He claims that his communications counsel, Martin R. Leader, told him that he need only locate a site that was available and that if the site was later sold L & could designate another one. With that understanding, he states, he then told L & K's engineer that L & K would locate its tower on the land he saw that was for sale.

35. Two years later, in 1985, when he visited the designated site, he discovered that condominiums had been constructed where he intended to locate L & K's tower. In 1985, L & K, when it petitioned to designate a new site, following Mr. Monicatti's discovery, told the Commission that it did not have reasonable assurance for its originally designated site; apparently the reason it made this concession was because it believed Mr. Monicatti's behavior was excusable since he acted on the mistaken belief that, if the land was for sale it could be considered reasonably assured for use by & K. The Mass Media Bureau, however, designated this site availability issue and rejected the petition to amend to designate a new site.

36. In 1985, Mr. Monicatti's account of the efforts he took to obtain a site clearly did not meet the reasonable assurance standard, as L & K conceded. According to Mr. Monicatti, he did not consult the landowner about arranging for use of the land and he had received no assurance that the site was suitable. His belief was founded on no more than his observation that the land was in an appropriate location to obtain coverage of Port Huron and that it was for sale. On December 4, 1986, L & K requested leave to have the Commission review the Bureau's action designating a site availability issue; at that time it still conceded, however, that it did not have reasonable assurance for the lost site. On December 23, 1986, L & K again requested leave to designate a new site; then too, it maintained it did not have reasonable assurance for the old site. And when L & K responded to the January 5, 1987 petition to enlarge issues filed by Family (which alleged misrepresentation about the site) it also did not state that it believed that reasonable assurance existed for the old site.

37. In 1987, however, when Mr. Monicatti testified, he said had forgotten throughout all the filings made in 1985, 1986 and 1987 that he had contacted real estate agent, Wynn Cooper about the designated site. Mr. Cooper, Mr. Monicatti now claims, told him the site was available. Moreover, Mr. Monicatti now represents that he was mistaken in telling the Commission that the site was unavailable when he found new condominiums on the land in 1985. The site was available, he said, and L & K had a 90 day option from the owner to use it. Since the close of the record, L & K has notified the Commission that the landowner has refused to renew the option and L & K is again without a site.

38. Mr. Monicatti's account of what Mr. Leader told him would be reasonable assurance in 1983, is not confirmed by any other witness or with testimony from Mr. Leader. Moreover, Mr. Monicatti's claim that he did receive assurance from the landowner's agent, in 1983, is also unsubstantiated by any other testimony and no testimony from that agent, Wynn Cooper, was submitted. In addition, Mr. Monicatti's claim that the site is - or was - available is, in important respects, untruthful. Mr. Monicatti, after questioning, conceded the site for the tower which L & K now proposes is in a different location. The site designated in 1983, as he represented to the Commission in 1985, is no longer available because condominiums are on the land. Instead, after much prodding, Mr. Monicatti admitted the site he claimed at the hearing is near the original site but it is on land bordering a public road and between two office buildings. The tower will no longer be, as originally proposed, supported by guy wires but it will be free standing. The reason is one of necessity since the new site is too small to allow for guy wires. There is, moreover, evidence that L & K's proposal could not comply with existing set-back requirements. Mr. Monicatti concedes that, in making his newest site proposal, he did nothing to determine whether the site is suitable for the proposed tower. Thus, even if L & K's hearing proposal were creditable, it has again failed to justify its belief that the site is suitable and available. *National Innovative Programming Network, Inc. of the East Coast, supra*, 2 F.C.C. Rcd 5641, 5643.

39. The designation by an applicant of a site location is central to its technical proposal. L & K's account of how it prepared its proposal is not credible. Its witness on this issue, Kenneth Monicatti, exhibited demeanor which indicates he cannot be relied on to answer truthfully. The Commission's instructions to Form 301 are specific in explaining what is necessary to establish reasonable assurance. Mr. Monicatti was the person responsible for obtaining the site information for the application form. He admits that, from the outset, he had experienced legal advice about what would be reasonable assurance for a site. His account of what that advice was, is, however, unbelieveable. Counsel for L & K is experienced, and the law defining what amounts to reasonable assurance is no

different today than it has been. It is simply not credible that Mr. Monicatti was told that he need only find land that was for sale where a tower could be built before it could be designated as L & K's site. His additional claim that he was told that, if the land was then sold, L & K could, without question, move to another site is equally unbelieveable. Mr. Monicatti's occupation, at the time, was building and managing a tower site for New Tower, Inc. There is no doubt from his testimony that he knew that the location of an applicant's site is of material importance in reviewing its techical proposal. It is unreasonable to assume that Mr. Monicatti, when he was engaged in building a tower, would believe that tower proposals could be transitory and that without good cause, the Commission would permit changes in an applicant's technical proposal.

40. L & K's claim at the hearing that Mr. Monicatti, in fact, met the reasonable assurance test in 1983 is also unbelieveable. Mr. Monicatti's story that he met on two occasions, in 1983, with a real estate agent representing the landowner but for three years he forgot about it appears concocted. There is no supporting evidence to substantiate that claim. In 1985, when he was told by his counsel that he did not have reasonable assurance, it is not creditable that he would not have recalled his meeting with a real estate agent when he knew that that might establish reasonable assurance. When attempts were made in 1986 and 1987 to overturn the Bureau's rejection of L & K's petition for leave to amend to a new site, it is not likely that Mr. Monicatti would not have recalled every step he took to secure the original site since he knew that information could be central to a review of the Bureau's action. If L & K had any understanding with the owner of the land about the site, Mr. Monicatti did not inform the Commission in 1985, when he discovered the site was occupied by condominiums. He did not contact the landowner to see why his understanding had been ignored; instead, he told the Commission that the site was no longer available.

41. During the hearing, Mr. Monicatti tried to convince the Commission that he really intended to designate an area much larger than the original area where he marked the location of his tower and that he would now locate on another portion of that area, which is removed from where the condominiums have been built. While L & K took a short term lease for that new area, which has not been renewed, Mr. Monicatti admits that he never checked to see whether the new location, which is between two office buildings, would be suitable for the proposed tower or whether the proposal is consistent with existing land use requirements. When it became apparent during questioning that the new area could not accommmodate the guy wires L & K proposed to support the tower, he said that guy wires were no longer part of L & K's proposal. L & K now proposed, he maintained, that the tower be free standing. There is no objective evidence that corroborates any part of his story.

42. The Commission accepts tentative arrangements for antenna sites. Despite the burden on its processes, when those arrangements dissolve through no fault of the applicant, the applicant is permitted to designate a new site. The fact that L & K does not have an antenna site is wholly its own fault. There is no reliable evidence that Mr. Monicatti ever talked with the landowner or anyone who acted as his agent until just before the hearing, nearly four years after claiming to the Commission that the site would be available. When questioned about that failure, Mr. Monicatti was unable to provide a reliable, truthful answer about what he did do. L & K has falsely claimed to have reasonable assurance of an antenna site; that false claim is a material misrepresentation made by the controlling owner of L & K. For that reason L & K is unqualified to become a broadcast licensee.

Family's Certification of Its Finances

43. The Commission requires that applicants certify that they have sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate it for three months without revenue. Forms P & F (Rad. Reg.) 2d 98:301-4 (1987). Applicants must be prepared to document or substantiate their financial qualifications. *Id.* Those applicants that certify without any basis or justification raise an inference that they falsely certified. *Certification By Applicants for Broadcast Station Construction Permits*, 2 F.C.C. Rcd 2122 (1987). False certifications are an abuse of the Commission's processes and are a material misrepresentation to the Commission. *Id.*

44. The record does not support a conclusion that Family falsely certified or that it did not, at the time it certified, have available the money required to construct and operate. It is also evident that it currently has the amount needed. The record does reflect, however, that Family did not adequately document its financial plans before it certified but it does not indicate that Family's certification was false or undertaken in bad faith.

45. Martin Doorn was the Family principal who arranged for Family's financing and certified that the applicant was qualified. He had an accountant determine how much money would be needed. That accountant, Roger Gardner, methodically sought out knowledgeable advice about what the costs of building and operating would be. He concluded that 168,867 would be needed and he substantiated for Mr. Doorn that Family's lender, George Clark, could lend the agreed upon 200,000. Mr. Doorn and Mr. Clark orally arranged that Mr. Clark would lend 200,000 and they set the conditions for the loan. They made their agreement before the certification was made and the application filed. While their oral agreement is unusual, it was not in this case because Mr. Clark has often provided Mr. Doorn, and the Northgate Bible Church he heads, with gifts of money. Mr. Clark has always been generous in providing for Mr. Doorn's projects and he never failed to fulfill a promise to Mr. Doorn to assist him financially. While Mr. Doorn did not personally review Mr. Clark's finances, he had Family's and Mr. Clark's accountant make that assessment and that accountant, Roger Gardner, told Mr. Doorn, on the basis of Mr. Clark's balance sheet, that Mr. Clark could provide the money. Thus, Mr. Clark agreed to provide the money under conditions that he and Mr. Doorn set and Mr. Gardner, who is Mr. Clark's accountant, said that Mr. Clark's financial records indicated he had adequate liquid assets to meet his promise. So far that has proven to be the case. Mr. Clark has supplied Family with 49,111 and, in an effort to establish his good faith, he produced a letter of credit from a bank to substantiate that he can provide the money. In addition, apparently out of caution, Family has increased its estimate of how much money it will need and it has submitted a letter from a financial institution which provides for lending the money to Family. Family stockholders have also provided the necessary guarantees to the bank.

46. The hearing record substantiates that Family acted in good faith when it certified and that it was then and is now financially qualified. Family has also been able to demonstrate that it made the necessary assessment of its financial qualifications before it certified. On the basis of this very complete hearing record, Family is financially qualified.

ACCORDINGLY, IT IS ORDERED that the petition for leave to file section 1.65 amendment, filed January 11, 1988 by L & K Broadcasting, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed November 25, 1987 by L & K Broadcasting, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend to designate a new antenna site, filed January 15, 1988 by L & K Broadcasting, Inc. IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the application of L & Broadcasting, Inc. (File No. BPH 830714AC) IS DENIED and the application of Port Huron Family Radio, Inc. (File No. BPH-830325AE) for a construction permit for a new FM broadcast station to operate on Channel 272A at Port Huron, Michigan IS GRANTED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Family and L & K, on May 1, 1987, filed a Joint Motion to Reopen Record to Accept Stipulation and that request was granted on August 25, 1987. *Memorandum Opinion and Order*, FCC 87M-2022, released August 27, 1987.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-140

In re Applications of

CATHERINE JUANITA HENRY	File No. BPH-831118AP
HARBOR COMMUNICATIONS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-840725IB
CALIFORNIA WOMEN IN RADIO, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-840725IF
EARNEL DURDEN and UNE DURDEN d/b/a DURDEN BROADCASTING CO.	File No. BPH-840727ID
SIMPSON COMMUNICATIONS LTD., A LIMITED PARTNERSHIP	File No. BPH-840727IG
NATIONAL UNIVERSITY	File No. BPH-840727IH
EVELYN JACKSON, *et al.*, d/b/a KALIEDESCOPE COMMUNICATIONS COMMITTEE	File No. BPH-840727II
ECHEVERRIA BROADCASTING CORPORATION	File No. BPH-840727IJ
AMIGOS DE SAN DIEGO, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-840727IM
REPRESENTATIVE MEDIA LIMITED PARTNERSHIP	File No. BPH-840727IP
TRIPLE BOGEY BROADCASTING, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-840727IT
NEW SOUNDS OF SAN DIEGO, INC.	File No. BPH-840727IU
SAN DIEGO BROADCASTING, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-840727IV
AMERICAN MEDIA GROUP, LIMITED PARTNERSHIP	File No. BPH-840727IW
SAN YSIDRO COMMUNICATIONS, A LIMITED PARTNERSHIP	File No. BPH-840727IY
HG COMMUNICATIONS, A LIMITED PARTNERSHIP	File No. BPH-840727IZ
COLOM COMMUNICATIONS CORPORATION	File No. BPH-840727JA
SAN DIEGO COMTRENDS, INC.	File No. BPH-840727JD
VISTA GRANDE BROADCASTING, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-840727JI
DIANE OSEQUERA	File No. BPH-840727JJ
SOLEDAD BROADCASTING COMPANY	File No. BPH-840727JK
MARIA ELENA LASO BRADLEY	File No. BPH-840727JL

For Construction Permit for a
New FM Station San Diego, California

ORDER

Adopted: September 9, 1988; Released: September 20, 1988

By the Review Board:

1. Now before the Board is an "Emergency Motion for Continuance" filed by Triple Bogey Broadcasting, a California Limited Partnership (TBB), on September 8, 1988, seeking continuance of the date of the oral argument in this proceeding now scheduled for September 9, 1988.

2. In support of its request, TBB claims that "over the past eighteen months . . . extensive and continuous discussions" concerning settlement of this proceeding have been conducted amongst the parties and that, as a result, "substantial progress has been made." While no written or binding settlement agreement has been reached at this juncture, it is represented that "the prospects for settlement of this case justify this request."

3. It is further represented that counsel for all parties (with the exception of Simpson Communications Ltd., and Catherine Juanita Henry, who could not be reached) have all either joined in, consented to, or offered no objection to the request.

4. While ordinarily reluctant to entertain this type of "eleventh-hour" request for continuance of an oral argument before the Board, we believe, on balance, given the scope, size, and complexity of this proceeding (involving an exceptionally significant number of parties) the continuance requested herein should be granted. This will conserve the resources of the Commission and serve the public interest, and enhance the possibility of initiating broadcast service at the earliest possible time.

5. On the other hand, we also expect the parties to attempt to present a final settlement agreement at the earliest possible date. Thus, the parties will either file a settlement agreement, or notify the Board that such a settlement is not possible, not later than October 7, 1988. Also, so that all parties have sufficient notice, we are hereby rescheduling oral argument (at the same time and location) for October 14, 1988. The parties are on notice that we do not anticipate that this date will be continued absent a final settlement agreement.

6. Finally, we note that five of the applicants remaining in this proceeding whose applications were denied by the *Initial Decision*, 3 FCC Rcd 820 (1988), did not file exceptions. Thus, pursuant to 47 CFR §1.276(f) (When any party fails to file exceptions within the specified time to an initial decision which proposes to deny its application, such party shall be deemed to have no interest in further prosecution of its application, and its application may be dismissed for failure to prosecute), we will dismiss the applications of California Women in Radio, National University, Kaliedescope Communications, HG Communications, and Colom Communications. *See Mark L. Wodlinger*, 3 FCC Rcd 698 (Rev. Bd. 1988).

7. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 CFR §1.276(f), the applications of California Women in Radio, a California Limited Partnership (File No. BPH-840725IF); National University (File No. BPH-840727IH); Evelyn Jackson, *et. al.*, d/b/a Kaliedescope Communications Committee (File No. BPH- 840727II); HG Communications, a Limited Partnership (File No. BPH-840727IZ); and Colom Communications Corporation (File No. BPH-840727JA) ARE DISMISSED; and,

8. IT IS FURTHER ORDERED, That the "Emergency Motion for Continuance" filed by Triple Bogey Broadcasting, a California Limited Partnership, IS GRANTED, and the oral argument in this proceeding is rescheduled as indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-431

In re Applications of

LIFT HIM UP OUTREACH MINISTRIES, INC. (hereafter Lift)	File No. BPH-860703MA
JACKSON BROADCASTING, LTD. (hereafter JB)	File No. BPH-860703MB
UNIVERSITY OF OKLAHOMA (hereafter University)	File No. BPED-860703MC
OKLAHOMA CITY COUNSELING CENTER, INC. (hereafter OCCC)	File No. BPH-860702MF (PREVIOUSLY DISMISSED)

For Construction Permit for a
New FM Station on Channel 289A (105.7 MHz),
Spencer, Oklahoma

HEARING DESIGNATION ORDER

Adopted: August 2, 1988; Released: September 19, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* On July 2, 1986, OCCC filed an application for a new FM station in Spencer, Oklahoma. On July 25, 1986 the Commission returned the instant application as insufficient for tender because OCCC's application proposed operation on Channel 275A (102.9 MHz) in lieu of Channel *289A (105. 7 MHz)* allocated for Spencer, Oklahoma.

3. On August 25, 1986, OCCC filed a timely petition for reconsideration of the Commission's return of the instant application. OCCC alleges that the incorrect channel number was due to a clerical error. In support of its petition, OCCC relies on the unsigned affidavit of its consulting engineer to show that the engineering was performed on the correct channel (289A), and that the error was caused by the engineer working on several applications for FM window No. 13 (which has 11 communities listed for Channel 275A) which culminated, during the final typing of OCCC's application, in his inadvertently substituting the incorrect channel for OCCC's application. Finally, OCCC argues that its application should be reinstated on a *nunc pro tunc* basis since the needed information "can be derived from the application as a whole" in accordance with the Commission's policy on commercial FM applications.

4. One element of tenderability of an application is that it must be correct as to channel information. The Commission addressed specifically the effect of inconsistent information in Appendix D to the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied*, 50 Fed. Reg 43,157 (1985):

> If any . . . information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender.

Report and Order, supra, at 19946.

5. Contrary to OCCC's allegations, it is impossible to determine which channel is proposed for operation. Because reference is made to Channel 275A throughout the application, we cannot necessarily assume that the application was intended for Channel 289A in Spencer, Oklahoma. OCCC's application thus contained inconsistent information that the Commission staff, "drawing on the application as a whole," was unable to resolve "confidently and reliably." *See Mary L. Smith d / b / a Radio Roswell*, 2 FCC Rcd 722 (1987); *cf. Matthew D. Wiggins, Jr.*, 1 FCC Rcd 401 (1986); *Star Signal Corporation*, 1 FCC Rcd 405 (1986). Consequently, OCCC has failed to demonstrate under 47 C.F.R. § 1.106(d)(2) that the Commission erred in returning its application. Accordingly, its petition for reconsideration must be denied.

6. *JB.* Wilbur O. Colom (Colom) is the general partner of COBEC Broadcasting Limited Partnership (COBEC), the proposed limited partner of JB. In order for its limited partners to be exempted from attribution under *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *recon. granted in part*, 58 RR2d 604 (1985), an applicant must certify that such limited partners "[shall] not be involved in any material respect in the management or operation" of the proposed station. 97 FCC 2d at 1023. Because JB provided no such certification concerning COBEC in its application, the interests of that limited partner, including its principal Colom, must be deemed attributable to JB for purposes of the instant application. In this connection, Colom was general partner of Tulsa Broadcasting Group (TBG), an applicant for new commercial television service on Channel 53, Tulsa, Oklahoma, under File No. BPCT-840921LI. In that proceeding, the Commission's Review Board upheld an initial decision disqualifying TBG on financial and misrepresentation/lack of candor issues for submitting a financial certification with an intent to de-

ceive the Commission regarding the applicant's financial resources. *See Tulsa Broadcasting Group*, MM Docket No. 85-169, 2 FCC Rcd 6124, 6125-26 (1987).[1]

7. Furthermore, Colom was a principal of Omaha Channel 54 Broadcasting Group, Limited Partnership (Channel 54), an applicant for new TV service on Channel 54 in Omaha, Nebraska under File No. BPCT-840921LG.[2] In the Omaha, Nebraska proceeding, the Administrative Law Judge made adverse findings against Channel 54 concerning air hazard, reporting and disclosure issues pursuant to 47 C.F.R. §1.65, which were sustained by the Review Board which "conclude[d] that the concatenation of facts and circumstances here present (the repeated violations of Section 1.65 of the Commission's Rule *plus* the failure to comply with valid discovery requests) demonstrates that Channel 54 willfully and repeatedly intended to deceive the ALJ, Telecasters and the Commission." 3 FCC Rcd at 873. On March 28, 1988, Channel 54 filed an application for review challenging the Review Board's disqualification of its application for misrepresentation, which is now pending before the Commission. Consequently, in the event of grant of a construction permit to JB, it will be made subject to the ultimate outcome of the Tulsa, Oklahoma and Omaha, Nebraska proceedings.

8. *University*. University requests waiver of 47 C.F.R. § 73.1125 of the Commission's rules in order to operate its proposed noncommercial educational FM station at Spencer, Oklahoma as a satellite station without a main studio in the city of license. University contemplates that the proposed station will be a satellite station for the educational radio programming originated by the University at station KGOU-FM in Norman, Oklahoma. University states that: (a) KGOU-FM provides programming to residents of Norman and the southern portion of the Oklahoma City metropolitan area; (b) KGOU-FM's signal does not adequately reach significant portions of the area, especially to the north and east; and (c) that area is inadequately served by other public radio stations with respect to news and public affairs programming, especially local programming. Additionally, University further states that the coverage area of the proposed new station at Spencer contains 423,818 persons that do not receive NPR's "Morning Edition," "Weekend Edition," and "All Things Considered" programs. Finally, University believes that a waiver of the main studio rule is in the public interest because the proposed satellite station at Spencer would fulfill the University's mandate to provide educational service to as wide an audience as possible in a manner consistent with the realities of present public broadcasting funding.

9. The Commission has traditionally allowed noncommercial educational licensees to operate in this manner. *See Nebraska Educational Television Commission*, 4 RR 2d 771 (1965). In so doing, the Commission recognizes the realities of public broadcasting funding and the ongoing problems of educational licensees in raising the necessary funds to expand and provide noncommercial educational programming to all our citizens. The licensees of noncommercial stations must necessarily find ways to get cost-efficient programming to as many viewers as possible. University's proposal is consistent with this concept. The savings realized from not having to construct a main studio can be utilized to assist University in expanding quality programming to a greater number of viewers. We find, therefore, that University has demonstrated good cause for not locating a main studio in Spencer, Oklahoma. In light of the above, University's requested waiver of 47 C.F.R. § 73.1125 will be granted. However, the absence of a studio and the proposed satellite operation in the present case may be relevant in the comparative evaluation of the application and will be considered therein.

10. *Other matters*. Engineering study indicates that University has not specified values to the 3.16 mV/m contour for the eight radials. University has, however, correctly plotted these distances on the contour map. The lack of a table of numbers for the 70 dBu contour for the eight radials does not constitute an acceptability defect since the correct values can be derived from the contour map and since city coverage is not in question. However, University will be required to provide the contour data to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. *Lift*. In response to Section VI, FCC Form 301, Lift has indicated that it will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), it is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. Lift's program is deficient in that it failed to include minority and female organizations and employment services it intends to contact. Therefore, Lift will be required to file the requested information with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. The applicant below has petitioned for leave to amend its application on the dates shown below. The accompanying amendments were filed after the last date for filing amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
University	May 11, 1987; May 31, 1988

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether JB, in the instant proceeding, made misrepresentations to the Commission, was lacking in candor in its dealings with the Com-

mission, or attempted to deceive the Commission in its reporting of the nature of principal Wilbur O. Colom's participation in Omaha Channel 54 Broadcasting Group, L.P., an applicant for a new television service in Omaha, Nebraska under File No. BPCT-840921LG.

2. If issue 1 is resolved in the affirmative, the effect thereof on JB's basic qualifications.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 2-5 hereinabove, the petition for reconsideration filed by OCCC IS DENIED.

17. IT IS FURTHER ORDERED, That in the event of a grant of a construction permit to JB, it will be made without prejudice to whatever action, if any, the Commission may deem appropriate in light of the ultimate outcome in MM Docket Nos. 85-169 and 85-170.

18. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 8-9 above, University's waiver request of 47 C.F.R. § 73.1125 IS GRANTED.

19. IT IS FURTHER ORDERED, That pursuant to paragraph 10 hereinabove, University shall file correct contour data with the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That pursuant to paragraph IV (recruitment) of the applicant's Model EEO Program, Lift shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, data providing examples of minority and female organizations, and employment services it intends to contact in filling job vacancies.

21. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by University ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

22. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On November 8, 1987, TBG filed an application for review of the Board's decision. That application is currently pending.

[2] In its response to Section II, Item 6, of FCC Form 301, JB asserts in Exhibit II that, respecting Channel 54, "Mr. Colom is a *limited partner* owning 45% of the [applicant's] equity." (Emphasis added.) However, as the Review Board noted in *Omaha Channel 54 Broadcasting Group*, L.P., MM Docket 85-170, 3 FCC Rcd 870, 872 (1988), "[a]t the time of the TV 58 dismissal, Wilbur Colom was the president of Channel 54." Consequently, this discrepancy in its reporting of the true nature of Colom's participation in Channel 54 will result in a misrepresentation/lack of candor issue being added in the instant proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-437

In the Matter of

Amendment of Section 73.202(b), RM-6367
Table of Allotments,
FM Broadcast Stations.
(Harold, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1988; Released: September 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers a petition for rule making filed by Inter-Mountain Broadcasting Company (petitioner), which seeks to allot Channel 285A to Harold, Kentucky, as that community's first local FM service. Petitioner stated its intention to apply for use of the channel.

2. Petitioner requested that Channel 285A be allotted to Harold, Kentucky, with a site restriction 11 kilometers (6.8 miles) east-southeast of the city at coordinates 37-30-23 and 82-31-11. However, a staff engineering analysis indicates that the proposed allotment of Channel 285A can be made at Harold, Kentucky in conformity with the minimum distance requirements of Section 73.207 of the Commission's Rules with a site restriction of 10.5 kilometers (6.5 miles) east of the city.[1]

3. In view of the fact that Harold, Kentucky could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Harold, Kentucky	--	285A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 14, 1988,** and reply comments on or before **November 29, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Inter Mountain Broadcasting Co.
Paul R. Gearhart
P.O. Box 159
Harold, Kentucky 41635
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates for Channel 285A, Harold, Kentucky at the restricted site are 37-30-23 and 82-31-11.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-436

In the Matter of

Amendment of Section 73.202(b), RM-6359
Table of Allotments,
FM Broadcast Stations.
(Valdosta, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1988; Released: September 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Multi-Media Broadcasting, Inc. (petitioner), requesting the substitution of Channel 244C2 for Channel 244A at Valdosta, Georgia, and the modification of its license for Station WZLS(FM) to specify the higher powered channel. Petitioner states that it will apply for Channel 244C2, if allotted.

2. Channel 244C2 can be allotted to Valdosta in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.6 kilometers (7.8 miles) northwest to avoid a short-spacing to Station WAIV-FM, Channel 245C, Jacksonville, Florida.[1] As requested, we shall also propose to modify Station WZLS(FM)'s license to specify operation on Channel 244C2 in lieu of its present Class A allotment. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Valdosta or require that the petitioner demonstrate the existence of an additional equivalent channel for use by such interested parties.

3. We believe the public interest would be served by proposing the substitution of Channel 244C2 for Channel 244A at Valdosta, Georgia, since it could enable Station WZLS(FM) to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Valdosta, Georgia	225C1, 239C2, 244A, 266C1, 299A	225C1, 239C2, 244C2, 266C1, 299A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 14, 1988,** and reply comments on or before **November 29, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Roy F. Perkins, Jr., Esq.
1724 Whitewood Lane
Herndon, Virginia 22070
(Counsel to petitioner)

Multi-Media Broadcasting, Inc.
Station WZLS(FM)
P.O. Box 5406
Valdosta, Georgia 31603
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 30-53-12 and West Longitude 83-23-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-435

In the Matter of

Amendment of Section 73.202(b), RM-6411
Table of Allotments,
FM Broadcast Stations.
(Brookfield, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1988; Released: September 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Dwight Carver (petitioner), requesting the substitution of FM Channel 245C2 for Channel 249A at Brookfield, Missouri. Petitioner also requests modification of the license of Station KZBK, Channel 249A, to specify operation on the higher class channel. Petitioner filed information in support of the proposal and stated his intention to construct the necessary facilities for operation on Channel 245C2.

2. We believe petitioner's proposal warrants consideration. The channel can be allotted in compliance with the minimum distance separation requirements and used at the current site of Station KZBK.[1]

3. We shall propose to modify the license of Station KZBK, Channel 249A, as requested by the petitioner, to specify operation on Channel 245C2. However, in conformance with Commission policy, should another party indicate an interest in the Class C2 allotment, the modification could not be implemented unless an additional equivalent channel is also allotted.

4. In order to provide a wide coverage area station for the Brookfield, Missouri area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Brookfield, Missouri	249A	245C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 14, 1988,** and reply comments on or before **November 29, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dwight Carver
KZBK Radio
107 Main
Brookfield, Missouri 64628

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 245C2 at Station KZBK's site are 39-50-26 and 93-04-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-434

In the Matter of

Amendment of Section 73.202(b), RM-6416
Table of Allotments,
FM Broadcast Stations.
(Flora, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1988; Released: September 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by John H. Pembroke (petitioner), seeking the allotment of FM Channel 248A to Flora, Mississippi, as that community's first FM broadcast service. Petitioner stated his intention to file an application for Channel 248A at Flora.

2. We believe petitioner's proposal warrants consideration. Channel 248A can be allotted to Flora, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 9.4 kilometers (5.8 miles) northwest of the community.[1] The site restriction will prevent a conflict with Station WRJH, Channel 249A, Brandon, Mississippi.

3. In view of the fact that the proposed allotment could provide a first FM broadcast service to Flora, Mississippi, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Flora, Mississippi	---	248A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 14, 1988,** and reply comments on or before **November 29, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John H. Pembroke
P.O. Box 22604
Jackson, Mississippi 39205

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 248A at Flora are 32-36-03 and 90-23-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-453

In the Matter of

Amendment of Section 73.202(b), RM-6456
Table of Allotments,
FM Broadcast Stations.
(Franklin, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1988; Released: September 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. Franklin Community Radio Company (petitioner), has a petition for rule making before the Commission for consideration requesting the allotment of Channel 297A to Franklin, Texas, as that community's first local FM service. Petitioner submitted information in support of its proposal and states its intention to apply for the channel, if allotted. The channel allotment can be made in compliance with the Commission's minimum distance separation requirements.[1]

2. In view of the fact that Franklin, Texas, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Franklin, Texas	---	297A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **November 14, 1988,** and reply comments on or before **November 29, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

L. A. Worden
Franklin Community Radio Co.
11502 Canyon Trail
Houston, Texas 77066
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The reference coordinates are 31-01-36 and 96-29-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 9, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMENDMENT TO BELLSOUTH'S PLAN FOR COMPARABLY EFFICIENT INTERCONNECTION FOR VOICE MESSAGING SERVICES

On August 31, 1988, BellSouth's operating companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth), filed an amendment to their comparably efficient interconnection (CEI) plan for voice messaging services (VMS), originally filed on March 18, 1988 (Pleading Cycle Established for Comments on BellSouth's CEI Plan for Voice Messaging Service, Public Notice, 3 FCC Rcd 1948 (1988)). BellSouth states a belief that the Commission has not acted on its CEI plan because some of the issues it raises are similar to those pending in the Open Network Architecture (ONA) proceeding. Therefore, BellSouth proposes to amend its CEI plan as follows:

1. VMS providers, both existing and new, may continue to obtain network service from state tariffs as they currently do. In other words, VMS providers will not be required to obtain network service under a new, separate state tariff section;

2. As an option to existing tariffed services, BellSouth proposes a separate state tariff section that will contain both new and newly unbundled network capabilities. These network services will be made available to all local exchange customers on an optional basis, including interexchange carriers using those facilities to provide enhanced services;

3. BellSouth will eliminate the two band, distance sensitive voice grade channel access link proposed in its original CEI plan. Instead, there will be a single monthly flat rate element (plus two-way measured service) applicable to all subscribers, including BellSouth's own VMS operations; and

4. BellSouth will modify its customer proprietory network information (CPNI) notice and response forms to conform with those previously approved by the Commission in connection with the BOC CPE Structural Relief Proceeding (CC Docket No. 86-79).

BellSouth states that this amendment should distinguish its CEI plan issues from those of the ONA proceedings and eliminate further delay in approval of its plan for VMS. According to BellSouth, its CEI plan, as amended, is similar to other CEI plans for VMS that the Commission already has approved. BellSouth notes that, except as expressly amended in this filing, its CEI plan for VMS remains, in all respects, as described in its plan currently on file with the Commission. BellSouth also states that its CEI plan amendment does not alter any of its proposals in its ONA plan.

Interested parties should file comments on this amendment by **September 20, 1988,** and reply comments by **September 27, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Parties should direct their comments only to BellSouth's proposed amendments and not to those aspects of its CEI plan that remain unchanged. A copy of each pleading should be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. Copies of BellSouth's amendment can be obtained from ITS, (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-428

In re Applications of

KBOT, INC. File No. BPH-870710MM
(hereafter KBOT)

CABOT BROADCASTING LIMITED PARTNERSHIP File No. BPH-870710MU
(hereafter CBLP)

For Construction Permit for a
New FM Station in Cabot, Arkansas
Channel 273A (102. 5 MHz)

HEARING DESIGNATION ORDER

Adopted: August 17, 1988 Released: September 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *KBOT*. Section II, Item 4 of FCC Form 301 (October 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. KBOT has not completed Item 4 correctly, giving the city and state as the residence address for principals Douglas N. Schneider, Vance Allan Smallwood and Brent Dodson. Accordingly, KBOT must submit an amendment which gives all the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Other Matters*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Although KBOT and CBLP filed such statements, they are deficient since neither lists clearly-defined minority organizations that they propose to utilize for the referral of minority job applicants. Accordingly, KBOT and CBLP will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That KBOT shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicants shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge: KBOT, CBLP.

9. IT IS FURTHER ORDERED, That the request to withdraw a proposed Settlement Agreement filed by CBLP IS GRANTED.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The parties to this proceeding originally filed a "Joint Petition For Approval of Settlement Agreement" on October 8, 1987; however, CBLP subsequently filed a reguest for withdrawal of the Settlement Agreement on April 7, 1988, which request will be granted below.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-427

In re Applications of

KAW VALLEY BROADCASTING CO. (hereafter Kaw) — File No. BPH-870710ME

NORTH FORT RILEY RADIO, INC. — File No. BPH-870710MV

ANITA KAY COCHRAN (hereafter Cochran) — File No. BPH-870710NE

For Construction Permit for a
New FM Station in North Fort Riley, Kansas
Channel 273C2 (102.5 MHz)

HEARING DESIGNATION ORDER

Adopted: August 17, 1988; Released: September 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Kaw.* Kaw is the licensee of FM Station KQLA (Ogden, Kansas). The current 1 mV/m contour of KQLA and the proposed North Fort Riley facility would overlap in violation of Section 73.3555(a)(1) of the Rules. It has indicated that, in the event of grant of the instant application, it will divest its interest in KQLA. Accordingly, in the event of grant of his application, Kaw will be ordered to divest itself of all interests in and sever all connections with KQLA(FM) prior to the commencement of program test authority.

3. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the proposed 3.16 mV/m (70 dBu) contour and that the applicant's public inspection file be located: (i) at the main studio, when the studio is within the city proposed to be served, and (ii) otherwise at any accessible location in the community, for inspection during normal business hours. *See Report and Order* in MM Docket 86-406, 2 FCC Rcd 3215 (1987). Kaw indicates that its main studio will be located within the station's proposed 3.16 mV/m contour at 5008 Frontage Road, Manhattan, Kansas, in compliance with Section 73.1125 of the Commission's Rules. However, the applicant's contour map, submitted as Engineering Exhibit VII, indicates that Manhattan is outside the proposed 3.16 mV/m contour. Additionally, an amendment filed on September 4, 1987 indicates that: (i) the applicant originally established two public files, one at the proposed studio site in Manhattan and one at the Fort Riley Public Affairs Office, HQ Building 108, Room 216 in Fort Riley, Kansas. However, the Department of the Army informed the applicant that it could no longer maintain the public inspection file on the base. The applicant further states that it was unable to locate an accessible location in the community of license at which the public file could be available for inspection during normal business hours. Therefore, the applicant indicates that its public file is located only at the Frontage Road studio in Manhattan, 1.2 miles from the eastern boundary of North Fort Riley and connected by a four-lane divided highway. Accordingly, an issue will be specified to determine Kaw's compliance with Sections 73.1125(a) and 73.3526(d), and, if not, whether circumstances exist warranting waiver of those rules.

4. Kaw petitioned for leave to amend its application on September 4, 1987. The last date for filing amendments as of right in this proceeding was August 3, 1987. Kaw's amendment reports a significant change in information furnished to the Commission and, pursuant to Section 1.65 of the Rules, is accepted for filing. However, Kaw may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from this amendment will be disallowed.

5. *Cochran.* Attempts to obtain Federal Avaition Administration (FAA) clearance through the Commission's Antenna Survey Branch and Cochran have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Cochran would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) pursuant to 47 C.F.R. § 73.1125(a), whether good cause exists for Kaw's proposed location of its main studio outside the station's 3.16 mV/m contour; and (b) pursuant to 47 C.F.R. § 73.3526(d), whether good cause exists for the proposed location of the public file outside the community to which the station is to be licensed.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Cochran would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That, in the event of grant of its application, Kaw must divest itself of all interest in and sever all connections with FM Station KQLA (Ogden, Kansas) prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Kaw IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-426

In re Applications of

TOMMY P. AND LINDA S. WOOLSEY — File No. BPH-870827NR

CRECELIUS/ LUNDQUIST COMMUNICATIONS CORPORATION (hereafter CLC) — File No. BPH-870827NW

For Construction Permit For a
New FM Station at Kemmerer, Wyoming
Channel 297A (107.3 MHz)

HEARING DESIGNATION ORDER

Adopted: August 17, 1988; Released: September 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *CLC*. CLC petitioned for leave to amend its application on the dates shown below. The accompanying amendments were filed after November 9, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

AMENDMENTS FILED
February 8, 1988
March 22, 1988
April 14, 1988 (Engineering)

3. Section II, Item 4 of FCC Form 301 (October, 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. CLC has not completed Item 4 correctly, providing a post office box number as the residence address for Sandra L. McManus. Accordingly, CLC must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days after this Order is released.

4. *Other Matters*. Data submitted by the applicants indicate there would be significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petitions for leave filed by CLC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That CLC shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-430

In re Applications of

WILLIAM L. ZAWILA, d/b/a SAN JOAQUIN BROADCASTING — File No. BPH-850711PJ

SUSAN LUNDBORG — File No. BPH-850712TE

For Construction Permit For a New FM Station on Channel 288A in San Joaquin, California

HEARING DESIGNATION ORDER

Adopted: August 17, 1988; Released: September 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM Service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-429

In re Applications of

GERMANTOWN RADIO COMPANY (hereafter GRC)	File No. BPH-870904MR
EUGENE WALTON (hereafter Walton)	File No. BPH-870904MS
ALBERT L. CRAIN & LOIS B. CRAIN (hereafter Crain)	File No. BPH-870904MT
WEST TENNESSEE BROADCASTING LIMITED PARTNERSHIP (hereafter West Tennessee)	File No. BPH-870908MG
CHARLES M. TRUB AND JERRY W. SIANO d/b/a T & S ASSOCIATES (hereafter T & S)	File No. BPH-870908MH
NOR - DOT BROADCASTING, INC (hereafter Nor-Dot)	File No. BPH-870908MI
HENDERSON BROADCASTING OF MEMPHIS, INC. (hereafter Henderson)	File No. BPH-870908MJ
NOVELLA BROADCASTING COMPANY, L.P. (hereafter Novella)	File No. BPH-870908MM
DAVID J. BOTT AND CARESE C. BOTT, JOINT TENANTS (hereafter Bott)	File No. BPH-870908MN
AMERICAN INDIAN BROADCASTING GROUP (hereafter American)	File No. BPH-870908MQ
PEDERSON COMMUNICATIONS LIMITED PARTNERSHIP (hereafter Pederson)	File No. BPH-870908MS
GRACELAND BROADCASTING, INC. (hereafter Graceland)	File No. BPH-870908MT
OMNI BROADCASTING CORP. (hereafter Omni)	File No. BPH-870908MV
WMQM, INC. (hereafter WMQM)	File No. BPH-870908MW
GERMANTOWN BROADCASTING CORP. (hereafter GBC)	File No. BPH-870908MY
GERMANTOWN FM, INC. (hereafter GFI)	File No. BPH-870908MZ
HEART OF AMERICA BROADCASTING, LTD. (hereafter Heart)	File No. BPH-870904MV (PREVIOUSLY DISMISSED)

For Construction Permit for a
New FM Station on Channel 298A (107.5 MHz) in
Germantown, Tennessee

HEARING DESIGNATION ORDER

Adopted: August 16, 1988; Released: September 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* On April 21, 1988, Heart filed a petition for reconsideration of the action of the Chief, FM Branch, returning its application as unacceptable for filing based on a preliminary engineering study which revealed that the proposed facilities would be 0.8 km short-spaced to the referenced coordinates of KFTH(FM), Marion, Arkansas, in violation of 47 C.F.R. § 73.207. No waiver request had been included in the application as originally tendered.

3. In support of its petition, Heart asserts that the short-spacing involved, 0.8 km, is *de minimis* under *Kentner v. FCC*, 62 RR 2d 1579 (D.C. Cir. 1987). In this connection, Heart argues that such short-spacing, "equal

[to] 0.5 miles," is not cognizable under *Ronnett Communications Corp.*, 51 RR 2d 229 (1982), and therefore does not require a waiver. Heart concludes that its application was substantially complete as tendered and should be reinstated on a *nunc pro tunc* basis. Heart's reliance on the above-cited precedent, however, is misplaced. Neither case involved a mutually exclusive application for new facilities which, as in the instant case, was originally filed without a request for waiver of 47 C.F.R. § 73.207. In this regard, in its *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985), the Commission adopted new "hard look" procedures for the processing of FM broadcast applicatons. However, the *Report and Order* made no substantive change in existing policy governing acceptability as defined in 47 C.F.R. § 73.3566(a) which provides, in pertinent part, that applications "patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will not be accepted for filing." *See Teton Broadcasting Limited Partnership*, FCC Rcd 518, 521 n.5 (1986). Further, the *Report and Order* specifically states that resubmission of an unacceptable application with a curative amendment, as requested here, will not gain it *nunc pro tunc* status. Accordingly, Heart's petition for reconsideration must be denied.

4. *Other matters.* In its application at Section V-B, Item 20, FCC Form 301, GBC has indicated that construction of its proposed facilities may significantly affect the environment because its tower will be located in a flood plain as described in 47 C.F.R. § 1.1307(a)(4). The applicant has submitted an Environmental Assessment which lacks "evidence of site approval which has been obtained from local or federal land use authorities" under 47 C.F.R. § 1.1311(c). Consequently, we are concerned that GBC may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (Apr. 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set forth in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. Accordingly, GBC will be required to file, within 30 days of the release of this Order, an amended EA indicating that such approval has been obtained pursuant to 47 C.F.R. § 1.1311(c). In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. Elsewhere in its application, GBC reports that its principals, A.J. Henderson, Jr. and William E. Taylor, are holders of the license of WKBJ(AM) and WYNU(FM), Milan, Tennessee. The above principals pledge that they will divest their interests in WKBJ(AM) and WYNU(FM) should GBC's application be granted. Accordingly, an appropriate condition will be specified below.

6. *GRC.* In its application, GRC reports that Dana Harmon, husband of principal Lisa Ortiz Harmon, is presently employed by KIX Broadcasting, Inc., licensee of WGKX(FM), Memphis, Tennessee, as Vice President for Programming. The above principal states that Dana Harmon will terminate his employment at WGKX(FM) should the GRC application be granted. Accordingly, an appropriate condition will be specified below.

7. *Henderson.* In its application, Henderson reports that its principal, Freddie Henderson, is employed by the licensee of WLOK(AM), Memphis, Tennessee, as Sales Manager. The above principal states that he will terminate his employment at WLOK(AM) should the Henderson application be granted. Accordingly, an appropriate condition will be specified below.

8. *Bott.* In its application, Bott reports that its principals, David J. Bott and Carese C. Bott, are employed by Victory Communications, Inc., licensee of WCRV(AM), Collierville, Tennessee, as General Manager and Director of Community Service, respectively. The above principals state that they will resign their positions with WCRV(AM) should the Bott application be granted. Accordingly, an appropriate condition will be specified below.

9. *Nor - Dot.* In its application at Section V-B, Item 17, FCC Form 301, Nor-Dot has specified that it intends to serve 1,906 square kilometers within its proposed 1 mV/m contour, but has failed to indicate the population, according to the latest census, within that area. Accordingly, Nor-Dot shall submit a corrective amendment pursuant to 47 C.F.R. § 73.3514(b) which provides such data, to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. *Omni.* Omni proposes to locate its antenna on the existing tower of WEVL(FM), Memphis, Tennessee. According to the Commission's data base, the height of this tower is 92 meters above ground level (AGL) and 181 meters above mean sea level (AMSL) at coordinates 35' 08' 05" N Latitude, 89' 45' 38" W Longitude. In its application at Section V-B, FCC Form 301, however, Omni lists the tower as *114* meters AGL and *202* meters AMSL at coordinates 35' *07' 46* " N Latitude, 89' 45' *30* " W Longitude. Omni explains that the coordinates it supplied were to correct those specified by the licensee of WEVL(FM), but is silent regarding the discrepancy in the data provided for tower height. Furthermore, the Commission's Antenna Survey Branch has notified us that neither set of figures for tower height at the new coordinates agrees with the data on file with the FAA. Because the applicant clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in its application, we were able, in the instant case, to ascertain that the data existing in the Commission's files for tower height and geographic coordinates for WEVL(FM) are inaccurate. Consequently, the discrepancies in tower height AGL and AMSL did not render the application unacceptable for filing. However, Omni shall be required to file a clarifying amendment pursuant to 47 C.F.R. § 73.3514 with the presiding Administrative Law Judge, within 30 days of the release of this Order, which provides correct data as to tower height above ground level and above mean sea level. In addition, an air hazard issue will be specified below.

11. In response to Section VI, FCC Form 301, the applicant below has indicated that it will employ five or more full-time employees. Pursuant to 47 C.F.R. §

73.2080(c), the applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO program submitted by the following applicant is incomplete or is otherwise deficient in the manner described below. Accordingly, the applicant listed below will be required to file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCIES
GRC	Failed to identify specific sources of recruitment specializing in women candidates; failed to identify publications it will utilize in attracting women and minority candidates.

12. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Bott	February 5, 1988 (Engineering); March 1, 1988
American	April 28, 1988; July 11, 1988
Graceland	March 23, 1988; April 20, 1988; May 12, 1988
GBC	February 16, 1988

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

14. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANTS: Crain, Omni, WMQM.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to GBC in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by the following applicants would constitute a hazard to air navigation: Crain, Omni, WMQM.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 2-3 hereinabove, the petition for reconsideration filed by Heart IS HEREBY DENIED.

18. IT IS FURTHER ORDERED, That in accordance with paragraph hereinabove, GBC shall submit an amended environmental assessment in compliance with 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order with a copy to the Chief, Audio Services Division.

19. IT IS FURTHER ORDERED, That in the event of a grant of GBC's application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, permittee shall certify to the Commission that A.J. Henderson, Jr. and William E. Taylor have divested their respective interests in the licensee of WKBJ(AM) and WYNU(FM), Milan, Tennessee.

20. IT IS FURTHER ORDERED, That in the event of a grant of GRC's application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, permittee shall certify to the Commission that Dana Harmon has terminated his position with KIX Broadcasting, Inc., licensee of WGKX(FM), Memphis, Tennessee.

21. IT IS FURTHER ORDERED, That in the event of a grant of Henderson's application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, permittee shall certify to the Commission that Freddie Henderson has terminated his position with the licensee of WLOK(AM), Memphis, Tennessee.

22. IT IS FURTHER ORDERED, That in the event of a grant of Bott's application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, permittee shall certify to the Commission that David J. Bott and Carese C. Bott have resigned their positions with Victory Communications, Inc., licensee of WCRV(AM), Collierville, Tennessee.

23. IT IS FURTHER ORDERED, That in accordance with paragraph 9 hereinabove, Nor-Dot shall, pursuant to 47 C.F.R. § 73.3514(b), submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That in accordance with paragraph 10 hereinabove, Omni shall file a corrective amendment pursuant to 47 C.F.R. § 73.3514 with the prersiding Administrative Law Judge within 30 days of the releae of this Order.

25. IT IS FURTHER ORDERED, That in accordance with paragraph 11 hereinabove, GRC shall submit Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge within 30 days of the release of this Order.

26. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Bott; American; Graceland; GBC.

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-433

In re Applications of

ATLANTIC CITY COMMUNITY BROADCASTING, INC. (hereafter ACCBI)	File No. BPH-870826ME
ADIO-VISION COMMUNICATIONS, LIMITED PARTNERSHIP (hereafter Radio-Vision)	File No. BPH-870826MF
KNIGHT RADIO, INC. (hereafter Knight)	File No. BPH-870826MH
BEACH COMMUNICATIONS (hereafter Beach)	File No. BPH-870826MJ
MAUREEN H. MENY, INC. (hereafter Meny)	File No. BPH-870827MB
ATLANTIC SHORE BROADCASTING (hereafter ASB)	File No. BPH-870827ME
HILLSIDE BROADCASTING LIMITED PARTNERSHIP (hereafter Hillside)	File No. BPH-870827MK
ATLANTIC WIRELESS BROADCASTING LIMITED PARTNERSHIP (hereafter Wireless)	File No. BPH-870827MO
AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter Group)	File No. BPH-870827MQ
SURF CITY BROADCASTING ASSOCIATES (hereafter Surf City)	File No. BPH-870827MR
TREMONT BROADCASTING CORPORATION (hereafter Tremont)	File No. BPH-870827MS
BOARDWALK ENTERPRISES LIMITED PARTNERSHIP (hereafter Enterprises)	File No. BPH-870827MW
TELECOMMUNICATIONS NETWORK, INC. (hereafter TNI)	File No. BPH-870827MX
NEW JERSEY PUBLIC BROADCASTING AUTHORITY (hereafter NJPBA)	File No. BPED-870827NB
Reginald W. Lavong and Sandra M. Delgiorno d/b/a D & L BROADCASTING (hereafter D & L)	File No. BPH-870827NC
LONG BEACH ISLAND RADIO CORPORATION (hereafter Long Beach)	File No. BPH-870827ND
FEATURE PRODUCTIONS, INC. (hereafter Feature)	File No. BPH-870827NN
FREEDAVE BROADCASTING COMPANY L.P. (hereafter Freedave)	File No. BPH-870827NP
BOARDWALK COMMUNICATIONS, INC. (hereafter BCI)	File No. BPH-870827NU
A. C. BOARDWALK BROADCAST ASSOCIATES A LIMITED PARTNERSHIP (hereafter AC)	File No. BPH-870827NY

Construction Permit a New FM Station on
Channel 297B1, Atlantic City, New Jersey

HEARING DESIGNATION ORDER

Adopted: August 23, 1988; Released: September 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. TNI certified, in response to Section VII, Item 2 of FCC Form 301 (October 1986) that it has reasonable assurance of the availability of its proposed transmitter site. However, TNI has included an exhibit qualifying this response. TNI's proposed transmitter site is located on municipal property owned by the City of Brigantine, New Jersey. TNI represents that the City Administrator has acknowledged that the City is "willing to make a parcel of land available for sale or lease for the erection of an FM broadcast tower." *See* Exhibit F annexed to TNI's application. TNI annexes to Exhibit 7 of its application a letter issued by the City Solicitor for the City of Brigantine. This letter states that the City is considering the sale or lease of municipally owned lands for the location of an FM antenna tower. The letter further states that such a sale or lease, by New Jersey statutory mandate, would be open to public bidding and would be awarded to the highest bidder. However, prior to such sale or lease, the Brigantine Board of Commissioners must approve the transaction as in the best interest of the City and adopt a formal resolution authorizing the sale or lease. The letter explicitly indicates that no such sale or lease has been so authorized:

> This letter has been prepared in response to several unsolicited offers made to City of Brigantine for the purchase or lease of municipally owned lands located North of Fifteenth Street, in the City of Brigantine. Please be aware that the City does not intend this letter to be construed as a commitment to enter into private negotiations with interested parties or as an acceptance of any offers previously made; but, is to be used by interested parties solely for the purpose of understanding the procedures which the City of Brigantine will implement should it decide to sell or lease municipally owned lands. The letter may be used by interested parties as notice to the Federal Communications Commission of the availability of lands in the City.
>
> The City of Brigantine, by this letter, makes no representation that it has offered any specific parcel of municipally owned lands for sale or lease at public bid. Rather, it must await decision by the Board of Commissioners that such a transaction is in the best interest of the City and the adoption of a resolution formally authorizing the sale or lease.

3. TNI argues that due to spacing and environmental constraints, the proposed site is the only suitable site for its transmitter. TNI concludes that under the standard enunciated in *Arizona Number One Radio, Inc.*, 103 FCC 2d 550, 60 RR 2d 89 (Rev. Bd. 1986) *aff'd*. 61 RR 2d 1585 (1987), it has done every thing in its power to "affirm acceptable, 'reasonable assurance'" of its proposed transmitter site. TNI further asserts that the City's authorization for the letter to be used as notice to the FCC of the availability of municipal land for an FM transmitter site satisfies the standard for reasonable assurance of site availability set out in *Arizona Number One Radio, Inc., supra*. TNI acknowledges, however, that the City's assurances are not unequivocal and that the City has refused to negotiate the terms under which the land may become available. Knight, Beach, Wireless, Group, Tremont, Enterprises, NJPBA, D & L, Long Beach, and Freedave have specified transmitter sites on land owned by the City of Brigantine; Long Beach and Freedave have included the above-referenced letter issued by the City Solicitor with their applications. Moreover, these applicants have certified that they have reasonable assurance of site availability.

4. Applicants are required, pursuant to paragraph 22 and Appendix B of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985) "to show some reasonable assurance that the site for each proposed transmitting antenna is available." 50 Fed. Reg. at 19939. Reasonable assurance "need not [be] a binding agreement or absolute assurance" that the proposed transmitter site is available to the applicant, "but a mere possibility, assumption or hope that the site will be available will not suffice." *Alden Communications Corp.*, 102 FCC 2d 518, 519 (Rev. Bd. 1985), quoting *Houston Family Television, Ltd.*, 101 FCC 2d 661, 58 RR 2d 1557 (Rev. Bd. 1985). The Commission assumes that an applicant who obtains reasonable assurance of site availability will also obtain any zoning change necessary to use the site for broadcast transmission, absent indications that such zoning changes will not be approved. *Alden Communications Corp., supra*. However, an applicant proposing to locate its transmitter on municipally owned land may not avoid the reasonable assurance standard by assuming approval of the sale or lease of the proposed site by the municipality's governing body as if the issue were solely one of zoning. *Id*. While the City Solicitor's letter purports to give notice to the FCC that municipally owned land is available for location of an FM transmitter, such notice does not necessarily constitute reasonable assurance that the above listed applicants' proposed transmitter sites are available. The sale or lease of municipal land for such a purpose has only been contemplated, and the Brigantine Board of Commissioners has not yet authorized the the sale or lease of City land for an FM transmitter site. Accordingly, an appropriate site availability issue will be specified against each of the applicants specifying the municipal Brigantine site. *See Alden Communications Corp., supra*, 102 FCC 2d at 519-21.

5. Meny and AC propose to mount their antennas atop the Brigantine Inn, 1400 Ocean Avenue, Brigantine, New Jersey. Our engineering study indicates that these proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Meny and AC may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in General Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47

C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since the proposals of Meny and AC may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, Meny and AC will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must describe proposed protection for humans exposed to RF radiation on the roof and in the building itself. In addition, if the site is presently fenced in compliance with the guidelines, Meny and AC are required to so state and give the distance from the base of the tower to the fence. Accordingly, Meny and AC will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

6. ASB amended its application during the period for filing amendments as of right to reflect that the applicant had changed from a sole proprietorship to a limited partnership. The first page of the amendment listed two general partners: Glenn F. Scotland and Lawrence Hicks; and a limited partner, M. Robert DeCotiis. The amendment also contained revisions for pages 2 and 3 of FCC Form 301 (October 1986). In response to Section II, page 3, ASB indicated that Scotland, Hicks and DeCotiis are all general partners of the applicant. Because of this discrepancy, ASB will be required to file a clarifying amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. *Alien Ownership / Parties to the Applicant.* Section II, Item 9(a) of FCC Form 301 (October 1986) asks whether the applicant is in violation of the provision of 47 U.S.C. § 310 relating to interests of aliens and foreign governments. TNI has responded "yes" indicating that it is in violation of the provision and has attached an explanatory exhibit to its application. *See* Exhibit 3 annexed to TNI's application. In that exhibit, TNI discloses that it is a holding company for several subsidiaries. TNI's stock was offered publicly and TNI represents that stockholders holding 1% or more of TNI's voting stock are disclosed in Section II, Item 4 of FCC Form 301 (October 1986). TNI's exhibit also states: "To the best of the applicant's knowledge, it is in full compliance with the alien ownership provisions of the Communications Act as amended. However, the applicant will supply further information in this respect should this Commission so require." *See* Exhibit 3 annexed to TNI's application. In Section II, Item 4 of FCC Form 301 (October 1986), TNI lists Cede and Company (Cede) as one of its principals, controlling 48.425% of its voting stock. However, TNI has not provided all the information concerning Cede required by Section II, Item 4, *viz*, the name(s), address(es) and citizenship of the natural persons owning or entitled to vote Cede's stock. Consequently, TNI will be required to amend its application to clarify the discrepancy in its representations concerning compliance with 47 U.S.C. § 310 and to provide the required information concerning its principal Cede. Such an amendment shall be filed within 30 days of the release of this Order with the presiding Administrative Law Judge. Should the Administrative Law Judge determine that TNI is in violation of 47 U.S.C. § 310, an appropriate issue will be specified.

8. *Other Matters.* In response to Section III, FCC Form 301 (October 1986), Feature certifies that it is in the process of securing sufficient funds to construct and operate the requested facilities for three months without revenue. Feature also represents that it will amend its financial certification when "it is appropriate to do so." Feature has not amended its application to demonstrate its financial qualifications. Accordingly, an appropriate issue will be specified below.

9. ACCBI has disclosed that its principal Lawrence A. Hayes is Vice President and General Manager of WUSS(AM) Atlantic City, New Jersey. ACCBI has pledged that Mr. Hayes will resign his office and terminate his employment with WUSS(AM) in the event that ACCBI is granted a construction permit for the instant allocation. Accordingly, an appropriate divestiture condition will be specified below.

10. Beach has disclosed that its principals Steven Sinn and William Koplovitz are each 50% owners of Ocean Communications, licensee of stations WIBG(AM) and WSLT(FM), Ocean City, New Jersey and that principal Neely D. Crowley is Vice President and General Manager of Ocean Communications. Sinn and Koplovitz have pledged to divest themselves of their interests in WIBG and WSLT and Crowley has pledged to relinquish her employment at Ocean Communications in the event that Beach's application for the instant allocation is granted. Accordingly, an appropriate divestiture condition will be specified below.

11. Enterprises has disclosed that its principal Dean W. Reynolds is an employee of WUSS(AM), Atlantic City, New Jersey. Enterprises has pledged that Mr. Reynolds will resign his position with WUSS upon grant of its application for the instant allocation. Accordingly, an appropriate divestiture condition will be specified below.

12. Feature has disclosed that its principals Carmen J. Colucci and Daniel J. Merlo are General Manager and Chief Engineer, respectively, of WHSP(TV), Vineland, New Jersey. Also, Feature has disclosed that Mr. Colucci's wife, Anna L. Colucci is employed by WHSP(TV) as an accountant. Feature has pledged that Mr. and Mrs. Colucci and Mr. Merlo will resign their positions at WHSP(TV) and sever all connection with the station and its licensee, Silver King Broadcasting of Vineland, Inc., in the event that Feature's application is granted. Accordingly, an appropriate divestiture condition will be specified below.

13. In response to Section VI, FCC Form 301 (October 1986) and Section VI, FCC Form 340 (May 1985) the applicants below indicated that they will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396(A), the 5-point Model EEO Program. NJPBA has failed to submit an EEO Program and instead references the EEO Program submitted with its application for television service to Trenton, New Jersey representing that it will implement this program if granted the instant alloca-

tion. This is insufficient. NJPBA therefore will be required to amend its application within 30 days of the release of this Order by submitting an EEO Program in compliance with the provisions of the rules as set forth in FCC Form 396(A) to the presiding Administrative Law Judge. Furthermore, the EEO Programs submitted by the following applicants are incomplete or otherwise deficient in the manner described below. Accordingly, the listed applicants will be required to file amended EEO Programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCIES
Beach	Failed to identify specific sources of recruitment specializing in women and minority candidates.
D & L	Failed to identify specific sources of recruitment specializing in women candidates.

14. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Knight, Beach, Group, Enterprises, TNI, and Long Beach have not completed Item 4 correctly. Knight's application, as amended on July 21, 1988, gives a post office box number for principal Thomas H. Pierce. Beach's application gives a post office box number for principal Neely D. Crowley. Group's application fails to list a street address number for principal Lynwood Eaton. Enterprises' application gives a post office box number for principal Dean W. Reynolds. TNI's application gives a post office box number for principal Cede and Company. Long Beach's application fails to list a street address number for principal Laura Boyd. Accordingly, each of these applicants will be required to submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

15. NJPBA proposes to operate a non-commercial educational FM station on the instant commercial allocation. Section II, Item 4 of FCC Form 340 (May 1985) requires that a governmental or public educational agency or institution applicant specify the names and residence addresses (number, street, city, state) of all members of its governing board and chief executive. NJPBA has not completed Item 4 correctly. NJPBA's amended application lists the Commissioners of the New Jersey Public Broadcasting Authority but gives only the city and state as the residence address of each Commissioner. Accordingly, NJPBA will be required to submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Knight	November 16, 1987, July 21, 198
Beach	January 11, 198
Wireless	February 10, 1988, July 12, 198
Group	April 28, 1988, July 11, 198
TNI	July 12, 198
NJPBA	June 14, 198
BCI	February 19, 198

17. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

18. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANTS: ACCBI, Radio-Vision, Meny, ASB, Hillside, Surf City, Tremont, AC.

19. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

20. Accordingly, IT IS ORDERED, That, pursuant to 47 C.F.R. §309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the following applicants have reasonable assurance that the transmitter sites specified will be available to them: Knight, Beach, Wireless, Group, Tremont, Enterprises, TNI, NJPBA, Long Beach, Freedave.

2. If a final environmental impact statement is issued with respect to Meny and/or AC in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine with respect to Feature, whether the applicant is financially qualified.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: ACCBI, Radio-Vision, Meny, ASB, Hillside, Surf City, Tremont, D & L, AC.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

21. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Meny and AC shall submit the environmental assessment required by Section 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

22. IT IS FURTHER ORDERED, That ASB shall submit an amendment in accordance with paragraph 6 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That TNI shall submit an amendment in accordance with paragraph 7 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That in the event of a grant of ACCBI application, the construction permit shall be conditioned as follows:

> Prior to commencement of operation of the station authorized herein, the permittee shall certify to the Commission that its principal Lawrence A. Hayes has divested himself of the office of Vice President and his position as General Manager of WUSS(AM), Atlantic City, New Jersey.

25. IT IS FURTHER ORDERED, That in the event of a grant of the Beach application, the construction permit shall be conditioned as follows:

> Prior to commencement of operation of the station authorized herein, the permittee shall certify to the Commission that its principals Steven Sinn, William Koplovitz and Neely D. Crowley have divested themselves of, and severed any connection with, Stations WIBG(AM) and WSLT(FM), Ocean City, New Jersey.

26. IT IS FURTHER ORDERED, That in the event of a grant of the Enterprises application, the construction permit shall be conditioned as follows:

> Prior to commencement of operation of the station authorized herein, the permittee shall certify to the Commission that its principal Dean W. Reynolds has divested himself of employment with WUSS(AM), Atlantic City, New Jersey.

27. IT IS FURTHER ORDERED, That in the event of a grant of the Feature application, the construction permit shall be conditioned as follows:

> Prior to commencement of operation of the station authorized herein, the permittee shall certify to the Commission that its principal Carmen J. Colucci has divested himself of the position of General Manager WHSP(TV), Vineland, New Jersey, that its principal Daniel J. Merlo has divested himself of employment with WHSP(TV), Vineland, New Jersey and that Anna L. Colucci, wife of principal Carmen J. Colucci has divested herself of employment with WHSP(TV), Vineland, New Jersey.

28. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicants shall submit Section VI information in accordance with the requirement of 47 C.F.R. 73.2080(c) to the presiding Administrative Law Judge: Beach, NJPBA, D & L.

29. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicants shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301 to the presiding Administrative Law Judge: Knight, Beach, Group, Enterprises, TNI, Long Beach.

30. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, NJPBA shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 340 to the presiding Administrative Law Judge.

31. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Knight, Beach, Wireless, Group, TNI, NJPBA, BCI.

32. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

33. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

34. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R §1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

35. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 C.F.R. §311(a)(2), and 47 C.F.R. §73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-440

In re Applications of

CARROLL E. GARRISON, et al d/b/a SKYLINE BROADCASTING CO. (hereafter Skyline) — File No. BPH-870424MB

RITA A. CAPOBIANCHI d/b/a/ GREEN VALLEY BROADCASTING (hereafter Green Valley) — File No. BPH-870429MA

EIGHTY - NINETY BROADCAST GROUP (hereafter Eighty-Ninety) — File No. BPH-870429MB

McCLENAHAN BROADCASTING, INC. (hereafter McClenahan) — File No. BPH-870429MI

TIMOTHY FM LIMITED PARTNERSHIP (hereafter Timothy, Ltd.) — File No. BPH-870430MA

SPECTRUM BROADCASTING CORP. (hereafter Spectrum) — File No. BPH-870430MB

JEFFERSON BROADCASTING COMPANY (hereafter Jefferson) — File No. BPH-870430MC

COLLEGE TOWN RADIO LIMITED PARTNERSHIP (hereafter College Town) — File No. BPH-870430ME

K B COMMUNICATIONS, INC. (hereafter KB) — File No. BPH-870430MG

COMMUNICATION AUDIO VIDEO CORPORATION (hereafter Audio Video) — File No. BPH-870430MJ

For a Construction Permit for a New FM Station on Channel 298A in Charlottesville, Virginia

HEARING DESIGNATION ORDER

Adopted: August 25, 1988; Released: September 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Timothy, Ltd.* Thomas A. Lopez, general partner of Timothy, Ltd. has indicated that he is an "employee" at WWWV (FM) and WCHV (AM), Charlottesville, Virginia. Mr. Lopez states in the instant application that he will resign his position at WWWV (FM) and WCHV (AM) upon grant of the instant application. Accordingly, in the event of a grant of Timothy, Ltd.'s application, Thomas Lopez will be ordered to sever all connections with WWWV (FM) and WCHV (AM) prior to the commencement of program test authority.

3. *Jefferson.* Jefferson indicates that it will co-locate its antenna on the existing tower of TV Translator W64AO. According to the Commission's data base, the accepted coordinates for this tower are 37' *59' 03* " NL and 78' 28' *58* " WL. However, Jefferson listed the coordinates of the tower as 37' *58' 58* " NL and 78' 28' *55* " WL. Because this applicant clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in the application in question, the staff could, "drawing on the application as a whole," confidently verify the transmitter location by taking official notice of the site coordinates and tower heights as found in the Commission's files for the licensed co-located facility. Accordingly, Jefferson was found to be acceptable for filing; however, they shall be required to file a corrective amendment to their application with the presiding Administrative Law Judge within 30 days of the release of this Order.

4. Skyline is proposing to mount its antenna on an existing tower while Green Valley and Spectrum each propose to build a new tower for their antenna. However, our study indicates that the combined operation of the nearby stations and the new proposal may significantly exceed the radio frequency radiation guidelines under 47 C.F.R. § 1.1307(b). Accordingly, Skyline, Green Valley and Spectrum are required to amend their applications within thirty days of the date of this Order to demonstrate compliance with the RF radiation guidelines. The cumulative effect of the proposed operations and all nearby RF sources must be considered. Since the proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, Skyline, Green Valley and Spectrum are required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Skyline, Green Valley and Spectrum will be required to file within thirty days of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Di-

vision, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANTS	AMENDMENTS FILED
McClenahan	June 22, 1988
College Town	December 8, 1987

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Skyline, Green Valley and Spectrum, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1130-1219.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That, in the event of a grant of Timothy Ltd.'s application, Thomas A. Lopez shall sever all connections with WWWV (FM) and WCHV (AM), Charlottesville, Virginia prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That Jefferson shall file the corrective amendment called for in paragraph 3 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Skyline, Green Valley and Spectrum shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: McClenahan; College Town.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Subsequent to the filing of all applications in this proceeding the Commission granted a waiver of the short-spacing rules to First Virginia Communications, Inc., licensee of WMJR(FM), Warrenton, VA. As a result, WMJR(FM) is short-spaced to the instant allocation and to the following applicants herein: Skyline, Green Valley, Eighty-ninety, McClenahan, Spectrum, Jefferson and K.B. Since these applications were filed prior to the grant of this waiver, the existence of this limited short spacing consequently will have no impact on the applicants' basic qualifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
Phase I

In the Matter of

MTS & WATS Market Structure:

Average Schedule Companies
City of Brookings Remand Proceeding
On Motion for Release of Data

MEMORANDUM OPINION AND ORDER

Adopted: September 8, 1988; Released: September 20, 1988

By the Chief, Common Carrier Bureau:

1. The National Telephone Cooperative Association (NTCA) has filed a Motion for Release of Data seeking disclosure of information provided to the Commission by the National Exchange Carrier Association (NECA) in response to questions regarding the carrier common line pool which were posed by the Chief, Common Carrier Bureau (Bureau) in connection with the remand of *City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153 (D.C. Cir. 1987)(remand proceeding). Specifically, NTCA asks the Bureau to identify four local exchange companies (LECs) whose names have been masked from information released by the Commission which reflects the number of access lines, messages per line, settlements paid from the common line pool and the common line recovery ratio. ICORE, Inc. (ICORE), a consulting firm representing thirteen LECs, including the four carriers currently at issue, has filed an opposition to NTCA's motion, seeking to preserve the confidentiality of the company identities. For the reasons set forth below, NTCA's Motion for Release of Data is granted to the extent it seeks release of the names of the four ICORE companies and is otherwise denied.

2. This is not the first occasion the Bureau has had to consider whether the ICORE company information merits confidential treatment. Shortly after NECA responded to the Bureau's information request, ICORE filed a request for confidentiality. ICORE claimed that NECA's answers to three of the Bureau's questions contained data pertaining to the four ICORE companies which could, if released, discourage future cooperation with Commission efforts to gather information and threaten the competitive positions of the ICORE companies whose data are at issue. Letter from Michael H. Salsbury to Secretary, FCC (Sept. 15, 1987). The Bureau informed ICORE that it had failed to provide sufficient information to justify a finding of confidentiality under our Rules and afforded ICORE an opportunity to provide additional information supporting non-disclosure. Letter from Chief, Common Carrier Bureau to Michael H. Salsbury (Oct. 6, 1987). ICORE, thereafter, amplified its original confidentiality claim. Letter from Michael H. Salsbury to Chief, Common Carrier Bureau (Oct. 16, 1987). The Bureau, however, required disclosure stating that even in light of the new information, ICORE had still failed to demonstrate the confidentiality of its companies' data. Letter from Chief, Common Carrier Bureau to Michael H. Salsbury (Nov. 12, 1987)(letter ruling). ICORE sought Commission review of the Bureau's decision to release its companies' material. In the alternative, ICORE volunteered to withdraw its application for review if the Bureau agreed to mask individual company names before releasing the data. The Bureau ordered disclosure on the terms requested by ICORE to expedite public comment on the statistical material. *City of Brookings Remand Proceeding*, DA 87-1761 (Dec. 4, 1987)(December order).

3. NTCA and other parties inspected the redacted data and filed comments in the remand proceeding. NTCA argued that the data showed that the original system of common line settlements permitted carriers to receive payments greatly in excess of the unseparated common line cost of service. In reply, ICORE questioned this assertion and maintained that the record contained no evidence to confirm such a claim.

4. In its Motion for Release of Data, NTCA now states that release of the company identities will enable parties to compare individual company settlements with individual company costs through cross reference with publicly available cost data. NTCA also requests that the Commission make available any other information "not yet on the record or released for public review" which has been generated in the remand proceeding and is relevant to the question of overcompensation. ICORE has filed an opposition to NTCA's motion, contending that it amounts to nothing more than an untimely petition for reconsideration of the December order which directed release of the ICORE companies' data without reference to individual company identities. In addition, ICORE again questions the accuracy of NECA's calculations. Finally, according to ICORE, release of the company names would not add significantly to the value of the statistical information already disclosed and would unnecessarily delay the Commission's decision in the underlying remand proceeding. NTCA responds that any delay would be outweighed by the benefit of providing clear evidence regarding alleged overcompensation and compiling a complete record to support the Commission's action on remand. NTCA also states that ICORE's conclusion that the Motion for Release of Data is procedurally defective rests upon a mischaracterization of the December order and that specific company identities have since become of critical significance by virtue of ICORE's claims regarding the issue of overrecovery.

5. We first consider the procedural dispute regarding NTCA's motion. To resolve this issue, however, we need not determine whether NTCA's motion constitutes a petition for reconsideration untimely filed. Even assuming we were to find that NTCA's pleading is flawed in this manner, the critical fact remains that any party may, at any time, seek disclosure through the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Thus, we see no purpose to be served by dismissing the motion when NTCA could immediately file a FOIA request which we would be statutorily required to answer. Moreover, we are not aware of any statute, regulation or policy other than the FOIA which provides more appropriate guidance for the resolution of an information request before a federal agency. Accordingly, even though NTCA does not invoke the

FOIA in support of its motion, we believe it most efficient to rule on the motion applying the standards enunciated by the FOIA.

6. We now address the larger question of whether the ICORE company data should be released for public inspection in light of the FOIA. The questions of use and relevancy of the data at issue and undue delay in resolving the remand proceeding are secondary matters in a FOIA analysis.[1] Under the FOIA, material cannot be withheld unless it falls within a category of information specifically exempted from the statute's general disclosure requirements. In this regard, ICORE has previously maintained that its companies' data reflect proprietary business matters which are shielded from disclosure by Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). Exemption 4 protects from disclosure confidential commercial or financial information. Material is deemed confidential for Exemption 4 purposes when disclosure would be likely to cause the originating party substantial competitive harm. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)(*National Parks I*). However, in opposing release of specific company names, ICORE does not offer any evidence of competitive sensitivity beyond that previously considered and rejected by the Bureau. For the sake of clarity and completeness, we summarize ICORE's original confidentiality claim and repeat verbatim the bases for our conclusion that the information, including company names, does not qualify for protection under Exemption 4.

7. ICORE claimed that disclosure would adversely affect the abilities of its companies to "compete with other local telephone companies across the nation for certain kinds of long-distance access business." ICORE suggested that the statistical information would provide competitors with "a rough estimate" of company revenues for this aspect of their operations, permitting competitors to gain an "unfair advantage in bidding against the ICORE companies for current and future access business." The ICORE companies also feared that disclosure would threaten relations with customers of access services by revealing data which those customers consider proprietary, including "crucial information concerning the extent to which [the] customers . . . use AT&T WATS lines." ICORE argued that such information could reveal the customers' "costs and, therefore, profitability." Finally, the ICORE companies asserted that since NECA has not disclosed the source of its data or manner of calculation, the Commission was at risk of releasing "misleading and inaccurate information that may be viewed as reflecting poorly on the ICORE companies, their customers, or both."

8. We found that ICORE had failed to even satisfy the threshold test for application of Exemption 4 by demonstrating the existence of actual or incipient competition within its companies' sphere of operations. Apart from this, we rejected its claims of substantial competitive harm as factually specious and legally unsupported.

> The statement that the ICORE companies compete with other carriers 'across the nation' for access business suggests that individual exchange carriers compete with other carriers in different regions for the same access business. This ignores the reality that interexchange carriers secure access lines in the particular geographic areas where they are needed and that local exchange carriers, including the ICORE companies, essentially operate as monopolies within their service areas. Since a mileage charge is one aspect of the rates set by tariffs, an interexchange carrier would not be likely to seek lines from local exchange carrier distant from its point of service. When there is a multiplicity of service areas within a specific and limited geographical region, it is possible that access lines could be economically obtained from more than one local carrier. However, the rates charged for such lines are set by publicly filed tariffs. Further, any deviation from the terms or conditions that are contained in an interstate tariff is unlawful. 47 U.S.C. § 203(c). Therefore, we cannot discern how information indicating volume of traffic or amount of compensation received by the ICORE companies could or would assist another local exchange company in seeking new access business at the expense of the ICORE companies. ICORE's contention that disclosure would also threaten the relationship between each local exchange company and its customers is similarly tenuous. No explanation or evidence is offered as to how information detailing number of access lines and messages per line would show the extent to which an interexchange customer uses AT&T's WATS facilities. There is no data in NECA's submission that would indicate the termination facilities used by particular interexchange customers. Moreover, we will remove from the submission the single statement identifying a particular interexchange carrier as a customer of one of the ICORE companies. This excision should satisfy ICORE's concerns regarding release of customer-specific information. Without customer identities, material regarding use of the ICORE companies' facilities is essentially meaningless to a prospective competitor. Further, even if it were possible to predict customers' identities or estimate their use of a competing interexchange carrier's facilities, this limited and speculative information to a competitor would be, at best, of only marginal utility in judging the overall profitability of the company. Moreover, a disclosure which might cause customer dissatisfaction or disgruntlement does not necessarily rise to the level of competitive harm necessary to invoke Exemption 4. *See General Electric Co. v. NRC*, 750 F.2d 1394, 1402 (7th Cir. 1984); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983). Likewise, ICORE's failure to verify the information reported by NECA and its fear that its companies and their customers may be unfairly embarrassed are insufficient bases for withhold. ICORE may challenge the accuracy of NECA's submission in the context of the underlying remand proceeding and correct any misimpressions that might otherwise occur.
>
> Letter ruling, pp. 3-4.

9. ICORE has not presented us with any evidence to warrant departure from these conclusions. Further, if, as we determined, the entire submission pertaining to the ICORE companies cannot be judged confidential within the meaning of Exemption 4, then individual company names likewise cannot carry any competitive implications sufficient to justify non-disclosure. We believe it is also important to note that the Bureau order permitting the individual company names to be masked in no way rescin-

ded our previous determination that the ICORE company data do not merit confidential status. It was clearly stated that our acquiescence to the limited disclosure proposed by ICORE was made in the interest of facilitating prompt and informed comments in the remand proceeding:

> In the interest of expediting comment upon this additional information, we have concluded that the public interest would best be served, at this point, by releasing this information without revealing the individual identities of the companies that are associated with specific data. In so doing, we note that no party has heretofore requested that the names of specific companies be directly, and identifiably, associated with the data that NECA provided and that no party has stated that such information would facilitate analysis or the preparation of comments. . .

December order.

10. Moreover, even if the December order were read as some type of pledge to maintain the secrecy of specific company identities, such an action is not a sufficient basis for withholding under the FOIA. A promise or expectation of confidentiality does not, in fact, determine whether information falls within the protective ambit of Exemption 4. *National Parks I*, 498 F.2d at 767.

11. Finally, we decline to grant NTCA's request that we identify and release any additional information held by the Commission which is relevant to the issue of overcompensation. We agree with ICORE that such a request is "unreasonably vague." The request does not comport with the FOIA requirement that a party seeking disclosure "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3). We need not conduct a research project or exhaustive search applying our subjective judgment regarding the relevance of material to the issue of overcompensation to attempt to locate records which are not adequately identified.

12. Accordingly, IT IS ORDERED that NTCA's Motion for Release of Data is GRANTED to the extent that it seeks release of the names of the four ICORE companies and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] NTCA's concerns regarding the importance of individual company names in interpreting the information already disclosed and the relevance of the entire body of information to questions of public interest need not be resolved since we find, *infra*, that under the FOIA the ICORE companies' data cannot legitimately be withheld from a requestor. However, the Bureau's letter ruling anticipated such assertions by noting that

> We believe the information submitted by NECA, including that which ICORE seeks to shield from public disclosure, is relevant to the concerns that were expressed by the Court in ordering remand. Specifically, common line recovery ratios are clearly relevant to questions of whether the average schedules have resulted in equitable disbursement of revenues or provided some companies with excessive settlements. Ratepayers have an obvious interest in ensuring that the average schedules are fairly framed and administered and, therefore, should be afforded an opportunity to inspect relevant and critical data. Thus, even if we were to accept ICORE's assertions of substantial competitive harms, we have concluded that the public interest in release of the information in this case is sufficiently compelling that it requires disclosure.

Letter ruling, pp. 4-5.

In its application for review of the Bureau's letter ruling, ICORE contends that by this language the Bureau has indicated that it will order release of information which is relevant to an issue of public concern even if disclosure is not mandatory under the FOIA. ICORE believes that applying a standard of relevance to determine whether sensitive business data should be released on a discretionary basis would subject virtually all such data to public inspection and violate the limitations on disclosure imposed by the Trade Secrets Act, 18 U.S.C. § 1905. ICORE argues that public disclosure should not even be considered unless it has been demonstrated that competitively sensitive information is "central to the issues before the Commission." However, in characterizing our discussion as focusing on the relevance of the disputed data to public interest concerns, ICORE does not mention or dispute our finding that the material is of "critical" importance. Moreover, while we cannot rule on ICORE's application for review, we believe further explanation may be valuable. The Bureau's ruling was written while the ICORE companies' data were not publicly available. Therefore, any understatement of the value of the data to the disposition of public interest issues presented by the remand proceeding was the result of our concern that the confidentiality of the information should not be compromised before ICORE had exhausted its appeal rights. Information which is now public indicates that certain average schedule companies may be receiving settlements far in excess of costs. One company's common line recovery ratio was calculated to be over 1000%. We believe such information clearly is "central" to the question of whether the system of settlements based upon average revenue per message is equitable or provides a few companies with sizable windfalls ultimately at the ratepayers' expense. We reiterate, however, that our decision to order release of the ICORE companies' material, including company names, does not rest upon the public interest in release of the data but on our determination that it cannot be withheld under the FOIA.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-439

In re Applications of

Matthew D. Markel and Paul G. Kriegler d/b/a M and K Communications (hereafter M and K)	File No. BPH-871109MB
Nebraska Broadcast Limited Partnership (hereafter Nebraska)	File No. BPH-871109MJ
Greg Esquibel (hereafter Esquibel)	File No. BPH-871109MO

For Construction Permit for a
New FM Station on Channel 227A,
Bennington, Nebraska

HEARING DESIGNATION ORDER

Adopted: August 24, 1988; Released: September 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Nebraska.* On January 22, 1988, Nebraska filed an amendment to convey its interest from Nebraska Broadcast Associates, a general partnership, to Nebraska Broadcast Limited Partnership. Section II, Item 3(a) of FCC Form 301(October 1986) requires that an applicant certify that no limited partner will be involved in any material respect in the management or operation of the proposed station. Nebraska has not completed Item 3(a) correctly. Accordingly, Nebraska must submit an amendment which gives all of the information required by Section II, Item 3(a) to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT(S)	AMENDMENT(S) FILED
Nebraska	January 22, 1988 (engineering)

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That Nebraska shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amendment to its application supplying the correct information requested in Paragraph 2 above.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Nebraska.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-566

In the Matter of

Amendment of Section 73.202(b), RM-5895
Table of Allotments,
FM Broadcast Stations.
(Seaside, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 17, 1988; Released: September 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 2 FCC Rcd 7483 (1987), proposing the substitution of Channel 296B1 for Channel 296A at Seaside, California, and modification of the license of Cypress Communications, Inc. (Cypress) for FM Station KMBY, Channel 296A, to specify operation on the higher class channel.[1] Supporting comments were filed by the former licensee. Additionally, Cypress submitted supplemental comments.[2]

2. The *Notice* stated that Channel 296B1 could be allotted to Seaside provided the transmitter is sited at least 20.8 kilometers southwest of the community to avoid short-spacing to Station KSTN(FM) (Channel 297B), Stockton, California, and Station KPIG(FM) (Channel 298A), Freedom, California. [3] While such restriction was designed to resolve the noted spacing deficiencies, the *Notice* required a showing that, at that distance, city-grade coverage could be provided *(see* Section 73.315(a) of the Commission's Rules).[4]

3. In response to the *Notice*, the former licensee submitted an engineering statement demonstrating that, from a potential location 21.1 kilometers (13.1 miles) south it could provide a 70 dBu signal over Seaside.[5] This site also meets the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules to Station KSTN-FM, Stockton, and Station KPIG(FM), Freedom, California. A staff engineering review verifies that from the petitioner's proposed site, a 70 dBu signal could be provided over the entire community of Seaside.

4. On the basis of the above, the Commission believes the public interest would be served by substituting Channel 296B1 for Channel 296A at Seaside, California, since it could provide a first wide coverage area FM service to the community.[6] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KMBY(FM) to specify operation on Channel 296B1 in lieu of Channel 296A at Seaside, California.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 7, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Seaside, California	278A, 296B1

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Cypress Communications, Inc. for Station KMBY(FM), IS MODIFIED, effective **November 7, 1988,** to specify operation on Channel 296B1 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] At the time this proposal was filed, KMBY Radio, Inc. was the licensee of Station KMBY(FM). An assignment of the license to Cypress Communications, Inc. (BALH-880330EB) was subsequently granted July 1, 1988.

[2] These comments, which advise us of the recent assignment of license of Station KMBY(FM) from KMBY Radio, Inc. to Cypress, were not accompanied by a motion to accept. However, since the comments simply reaffirm Cypress' continuing interest in pursuing the modification proposal initiated by KMBY Radio, no prejudice will ensue from their acceptance.

[3] Reference coordinates utilized in that determination are 36-26-39 and 121-56-10. However, we have subsequently determined that use of that site would require locating the transmitter for proposed Channel 296B1 off-shore.

[4] The maximum distance for the provision of a 70 dBu signal by a Class B1 station is 23.2 kilometers.

[5] The determination of its ability to provide city-grade coverage is based on the former licensee's statement that the "northernmost" border of Seaside is 22.2 kilometers from its potential site.

[6] Reference coordinates for the Channel 296B1 allotment at Seaside, CA, are 36-25-38 and 121-53-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-249

In the Matter of

Amendment of Section 73.606(b), RM-6336
Table of Allotments,
Television Broadcast Stations.
(Cochran, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 18, 1988; Released: September 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of the Georgia Public Telecommunications Commission (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 2847 (1988), proposing the substitution of noncommercial educational Channel *29+ for noncommercial educational Channel *15 at Cochran, Georgia, and the modification of its license for Station WDCO to specify operation on the new channel. The petitioner filed comments supporting the substitution of channels and modification of its license. No other comments were received.

2. As stated in the *Notice*, petitioner's request was supported by the Department of Defense (DOD). DOD stated that the current operation of Station WDCO is of concern due to interference with the detection capabilities of an early warning ballistic missile detection facility located at Warner Robins Air Force Base, a problem which it believes would be exacerbated if petitioner's pending application for an increase in facilities at its present site were granted (BPET-860115KH).

3. Based on the record herein, we believe the public interest would be served by substituting noncommercial educational Channel *29+ for Channel *15 at Cochran, Georgia, and modifying petitioner's license for Station WDCO accordingly.[1] Channel *29+ can be allotted to Cochran, Georgia, at Station WDCO's present transmitter site, in accordance with the Commission's minimum distance separation requirements.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 7, 1988,** the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cochran, Georgia	*29+

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of the Georgia Public Telecommunications Commission for Station WDCO(TV), Cochran, Georgia, IS MODIFIED effective **November 7, 1988,** to specify operation on Channel 29+ in lieu of Channel *15, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall amend its pending minor change application for a construction permit (BPET-860115KH) to specify the new channel.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Cochran is one of the locations affected by the Commission's freeze on the allotment of new UHF frequencies in certain metropolitan areas since it is within the minimum co-channeldistance to Atlanta, Georgia. *See Order*, 52 FR 28346, July 29, 1987. However, we believe that this freeze does not affect our action here because the Commission is not adding an additional channel but only substituting onefor another, the deletion of Channel *15 at Cochran will further the national defense interests of the United States and our action will facilitate processing of an application filed before the imposition of the freeze.

[2] The coordinates for this allotment are North Latitude 32-28-11 and West Longitude 83-15-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-613

In the Matter of

Amendment of Section 73.202(b), RM-6055
Table of Allotments,
FM Broadcast Stations.
(Jenkins, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 2, 1988; Released: September 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, FCC Rcd 322 (1988), issued in response to a petition filed by Kincraft Industries, Inc. (petitioner), requesting the substitution of FM Channel 232C2 for Channel 232A at Jenkins, Kentucky. Petitioner also requested modification of its license for Station WIFX-FM, to specify operation on the higher class channel. Comments were filed by the petitioner in which it reiterated its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of FM Channel 232C2 for Channel 232A at Jenkins, Kentucky, since it could provide the community with its first wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements with a site restriction 12.8 kilometers (8 miles) west of Jenkins to avoid short spacing to Station WOAY-FM, Oak Hill, West Virginia.[1] As proposed, we shall also modify the license of Station WIFX(FM) to specify the higher powered channel.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 7, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Jenkins, Kentucky	232C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WIFX(FM), Jenkins, Kentucky, IS MODIFIED, to specify operation on Channel 232C2 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Reference coordinates are 37-09-00 and 82-46-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-431

In the Matter of

Amendment of Section 73.202(b),	RM-5767
Table of Allotments,	RM-5819
FM Broadcast Stations.	
(Cottonwood, Arizona)	

FIRST REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 18, 1988; Released: September 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 2 FCC Rcd 6274 (1987), issued herein, proposing the allotment of Channel 289A to Cottonwood, Arizona, as that community's second local FM service, in response to a petition filed on behalf of KVRD, Inc.[1] (KVRD) (RM-5767). Additionally, the *Notice* proposed to substitute Channel 240C for Channel 240A at Cottonwood and to modify the license of Station KSMK(FM), as requested by Central Broadcasting Company (CBC) (RM-5819). Comments were filed by KVRD and CBC. While CBC generally supports the actions proposed in the *Notice*, it does object in part. Therefore, as explained, *infra*, this *First Report and Order* concerns the request of KVRD only.

2. The *Notice* herein indicated that Channel 289A could be allotted to Cottonwood without the imposition of a site restriction, while that for Channel 240C required a transmitter location at least 10.5 kilometers (6.5 miles) west of the community to avoid short-spacing to Station KQZE-FM, Channel 239C, St. Johns, Arizona. In response, CBC objects to the site restriction, claiming that unless it can use a preferred electronics site on Mingus Mountain, no other suitable sites are available to it due to terrain factors. However, CBC's preferred site is short-spaced to an application (BMPH-870414IB), filed by Plateau Communications, Inc. (PCI), licensee of Station KQZE-FM, Channel 239C, St. Johns, Arizona, to relocate and modify its facilities.

3. As a result of the above, we cannot proceed with the modification request of CBC at this time. In the interest of expediting a new service to Cottonwood, however, we are severing KVRD's separate proposal since it is not in conflict with CBC's request, and no oppositions or other expressions of interest in the use of Channel 289A at Cottonwood were received.

4. We believe the public interest would be served by allotting Channel 289A to Cottonwood, Arizona, since it could provide a second local FM broadcast service to the community for the expression of diverse viewpoints and programming.

5. As indicated in the *Notice*, Channel 289A can be allotted to Cottonwood in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 7, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Cottonwood, Arizona	240A, 289A

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. The window period for filing applications for Channel 289A at Cottonwood, Arizona, will open on **November 8, 1988,** and close on **December 8, 1988.**

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] KVRD is the licensee of Station KVRD(AM), Cottonwood, which operates daytime-only.

[2] Coordinates used in this determination are those of the city reference point at 34-44-42 and 112-01-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-440

In the Matter of

Amendment of Section 73.202(b), RM-5921
Table of Allotments,
FM Broadcast Stations.
(Pukalani, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 18, 1988; Released: September 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6365 (1987), proposing to substitute Channel 252C2 for Channel 252A at Pukalani, Hawaii, at the request of Obie Broadcasting of Maui, Inc. (Petitioner), licensee of Station KMVI-FM, Channel 252A, at Pukalani. In addition, the *Notice* proposed to modify the station license to specify Channel 252C2. Petitioner filed comments in support of the proposal.[1]

2. After consideration of the proposal, we conclude that the public interest would be served by the channel substitution at Pukalani, in order to provide an increase in coverage by Station KMVI-FM. The substitution can be made in compliance with the minimum distance separation requirements. As stated in the *Notice*, petitioner proposes to relocate its transmitter to a site 14.8 kilometers (9.2 miles) south of Pukalani.[2]

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 7, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Pukalani, Hawaii	252C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station Obie Broadcasting of Maui, Inc., IS MODIFIED, to specify operation on Channel 252C2 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner filed a Motion to Accept Late Filed Comments, December 16, 1987. The date for filing comments in the proceeding ended December 10, 1987. Since the comments only restate an interest in the proposed upgrade, they have been accepted for consideration herein.

[2] Coordinates for Channel 252C2 at the site are 20-42-19 and 156-21-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-399

In the Matter of

Amendment of Section 73.202(b),	RM-5967
Table of Allotments,	RM-6171
FM Broadcast Stations.	
(Kingwood and Barrackville,	
West Virginia)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 23, 1988; Released: September 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of WFSP, Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 5994 (1987), proposing the allotment of Channel 226A to Kingwood, West Virginia, as that community's second FM service. Petitioner filed supporting comments restating its intention to apply for the channel. Barrackville Radio filed a counterproposal seeking the allotment of Channel 226A to Barrackville, West Virginia, as that community's first local FM service.[2] Petitioner submitted reply comments to the counterproposal.

2. Petitioner, in its reply comments, demonstrates that Channel 299A is available for allotment to Kingwood as an alternative channel. Petitioner further states that it is willing to apply for the alternative channel.

3. Our engineering analysis confirms that Channel 299A can be allotted to Kingwood in compliance with the Commission's minimum spacing requirements, [3] thereby, permitting Channel 226A to be allotted to Barrackville, West Virginia, consistent with the Commission's minimum spacing requirements.[4] Since the allotment at Barrackville is located within 320 kilometers (200 miles) of the U.S.-Canada border, concurrence has been obtained from the Canadian government.

4. In view of the above, we believe the public interest would be served by the allotments of Channel 226A to Barrackville, West Virginia and Channel 299A to Kingwood, West Virginia, as a first and second local FM service, respectively. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 7, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Barrackville, West Virginia	226A
Kingwood, West Virginia	244A, 299A

5. The window period for filing applications will open on **November 8, 1988,** and close on **December 8, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Barrackville, West Virginia, has been added to the caption.

[2] Public Notice of the counterproposal was given on December 9, 1987, Report No. 1697.

[3] The coordinates used in determing the available site are 39-28-18 and 79-41-00.

[4] The coordinates are 39-30-13 and 80-10-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-438

In the Matter of

Amendment of Section 73.202(b), RM-6327
Table of Allotments,
FM Broadcast Stations.
(Yermo, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1988; Released: September 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Robert Jason (petitioner), seeking the allotment of Channel 287A to Yermo, California, as that community's second local FM service. Petitioner states that he, or a corporation to be formed, will apply for the channel if this proposal is adopted.

2. A staff engineering analysis reveals that Channel 287A can be allotted to Yermo, California, in conformity with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is located in an area at least 2.6 kilometers (1.6 miles) east of Yermo[1] to avoid short-spacing to Channel 285A, Lenwood, California.[2] However, since Yermo is within 320 kilometers (199 miles) of the U.S.-Mexico border, the Commission must obtain concurrence of the Mexican government in this proposal before Channel 287A can be allotted.

3. In consideration of the above, and since the instant proposal could provide an additional local FM broadcast service to Yermo for the expression of diverse viewpoints and programming, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Yermo, California	251B	251B,287A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 14, 1988,** and reply comments on or before **November 29, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Daniel F. Van Horn, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Reference coordinates of the restricted site are 34-54-50 and 116-48-00.

[2] Channel 285A was allotted to Lenwood, California, in MM Docket No. 84-231, and was the 76th channel selected, for which applications may ultimately be accepted. Reference coordinates for Channel 285A at Lenwood are 34-49-26 and 117-04-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-441

In re Applications of

SUNSHINE TELEVISION, INC. File No. BPCT-860728KL

For a Construction Permit for a
New Television Station
Klamath Falls, Oregon

Appearances

Vincent J. Curtis, Jr., on behalf of Sunshine Television, Inc.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: September 12, 1988; Released: September 21, 1988

PRELIMINARY STATEMENT

1. This proceeding was designated for hearing by *Hearing Designation Order* (HDO), DA 86-200, released November 20, 1986. Originally, there were two-mutually exclusive applications, Garcia Communications (Garcia) and Sunshine Television, Inc. (Sunshine). Thereafter, pursuant to a settlement agreement, the application of Garcia was dismissed by the Presiding Judge in an *Memorandum Opinion and Order*, FCC 87M-080, released January 12, 1987. The application of Sunshine remained in hearing status to resolve an air hazard issue.

FINDINGS OF FACT

2. By amendment filed February 10, 1986, Sunshine reduced its antenna height to comply with FAA requirements (*See* FCC *Order*, 87M-772, released April 8, 1987).

3. While awaiting action by FAA on its proposed reduction of the antenna height, the owner of the proposed site requested of Sunshine to make a minor adjustment in the location of its tower and its height.

4. By amendment filed August 16, 1988, and by amendment filed August 29, 1988, Sunshine seeks to amend its application to reflect the minor location and height change. The geographic coordinates remain the same.

5. The Federal Aviation Administration (FAA) issued a notification that Sunshine's current proposal will not result in a hazard to air navigation. By motion filed August 29, 1988, Sunshine seeks summary decision of the specified air hazard issue.

CONCLUSIONS OF LAW

6. The FAA has determined that the Sunshine proposal will not constitute a hazard to air navigation. Thus, there is no longer any issue of material fact outstanding with respect to the air hazard issue pursuant to the provisions of Section 1.251 of the Commission's Rules. There are no other issues regarding Sunshine. Therefore, the application of Sunshine will be granted.

Accordingly, IT IS ORDERED that the Petition for Leave to Amend, filed August 16, 1988, and the Petition for Leave to Amend, filed August 29, 1988, by Sunshine ARE GRANTED and the amendments ARE ACCEPTED;

IT IS FURTHER ORDERED that the Motion for Summary Decision, filed August 29, 1988, by Sunshine IS GRANTED to the extent that the air hazard issue IS RESOLVED in favor the applicant Sunshine Television, Inc.; and

IT IS FURTHER ORDERED that the application of Sunshine Television, Inc. IS GRANTED, and this proceeding IS TERMINATED.[1]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public released, pursuant to 47 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Associated Information Services Corporation 7320-02/M-2391

Requests for Declaratory Ruling and Waiver and Extension of the Multiple Address System Construction Provisions of Section 94.51(a) of the Commission's Rules.

MEMORANDUM OPINION AND ORDER AND DECLARATORY RULING

Adopted: August 4, 1988; Issued: September 21, 1988

By the Commission:

I. INTRODUCTION

1. Associated Information Services Corporation (AIS) has filed a June 15, 1987, Request for Declaratory Ruling, asking us to find that its construction of master stations, without remote stations, substantially complies with the provisions of Section 94.51(a) of the Rules, 47 C.F.R. § 94.51(a). This rule section requires multiple address system (MAS) stations[1] to be placed in operation within 12 months from the date of the initial license grant.[2] AIS, alternatively, requests a waiver of Section 94.51(a) and an extension of time to construct its facilities until December 31, 1989, to comply with the operational requirements of the Rules. [3] No comments or other responsive pleadings have been filed.

2. For the reasons discussed below, we conclude that AIS's construction of master stations, without remote stations, fails to satisfy the one year operational requirements of the rules. We also conclude that AIS's request for waiver of the one year construction period must be denied. Grant of such a belated waiver request would undermine our policy of encouraging spectrum utilization by requiring prompt construction and implementation of authorized stations. AIS's timely request, however, for extension of the one year construction and operational deadline with respect to five stations for which the construction period had not yet expired will be granted.

II. BACKGROUND

3. AIS has attempted to develop a nationwide system for transmitting one-way data using unpaired 956 MHz frequencies that are assigned for use in the Private Operational-Fixed Microwave Service, governed by Part 94 of the Commission's Rules, 47 C.F.R. §§ 94.1 - 94.199. To implement its nationwide plans, AIS applied for and was initially granted licenses for 147 one-way MAS stations with locations in 147 different cities throughout the country. These licenses were issued during the period April 1984 through August 1987.

4. In April of 1987 Commission field engineers inspected three MAS stations licensed to AIS as part of a routine check on the timely construction of MAS stations. These stations were located in New Orleans, Louisiana (WEG 464), Dallas, Texas (WED 676) and Norfolk, Virginia (WEG 455). With regard to the New Orleans and Norfolk stations, the inspecting engineers determined that while master stations were installed and attached to antennas at each location, there were no remote stations constructed for either system. Although the engineers were unable to gain access to the Dallas transmitter site, monitoring of the frequency revealed no evidence of station operation.

5. As a result of these inspections, counsel for AIS met with Private Radio Bureau personnel on May 14, 1987. At this meeting AIS disclosed that, with the exception of its New York station,[4] none of AIS's 147 authorized systems were operational. AIS indicated that it had submitted licenses for cancellation for 54 stations the previous week because neither master nor remote stations were constructed for these facilities. It sought to retain, however, its authorizations for systems in the remaining 92 cities. AIS stated that it had installed master stations for these systems, but none of the associated remote stations. Shortly after this meeting, on June 15, 1987, AIS filed the instant request for relief from the cancellation provisions of Section 94.51(a) of the Commission's Rules.

III. ARGUMENT

6. In support of its petition, AIS states that it has invested 4.4 million to develop its nationwide one-way MAS digital transmission network. It indicates that its system requires MAS master transmitters and remote receivers that are capable of high data rate, error free transmissions. According to AIS, accuracy of the transmissions is essential because, unlike two-way systems, there is no return message from the remote units to verify the information or detect errors.

7. AIS further states that it constructed master stations for the 93 systems it wishes to retain within the one year period prescribed in the rules. With the exception of its New York system, however, AIS notes that it has not constructed any remote stations. AIS states that technical and marketing problems prevented it from placing its MAS remote stations into service. In this regard, it maintains that it experienced delays in the development and design of its remote receivers, which required extensive testing in the areas of fading, interference and distortion, to ensure error free reception in the data receiver. AIS also claims that frequent advances in MAS equipment capabilities required periodic redesign of its contemplated remote receivers. AIS, for example, indicates that its prototype remote was initially capable of operating at 600 baud and that its prototypes are now operating at 9,600 baud. AIS further notes that equipment is currently available that has 48,000 baud capabilities.

8. AIS contends that it demonstrated good faith, as well as compliance with the provisions of Section 94.51(a), by constructing only master station facilities in 92 cities. AIS emphasizes that it has voluntarily surrendered authorizations for stations in cities where it has been unable or unwilling to spend the funds necessary to build the systems. AIS states, however, that it does not rely solely on its assertion that its construction of these 92 master com-

ponents satisfies the operational requirement of the rules. Rather, AIS argues that equity and the public interest favor granting the relief requested.

9. AIS asserts that the purpose of the one year operational requirements of Section 94.51(a) is to assure that Commission licensees do not warehouse the limited available spectrum. AIS maintains, however, that an unyielding literal application of this rule section is a disincentive to the development of innovative and efficient spectrum use. AIS submits that its multi-million dollar expenditures and its continued site rental and equipment maintenance costs of 24,000 per month evidence its commitment to implement its authority. AIS, moreover, indicates that it has the financial resources to complete development and construction, as AIS is a wholly-owned subsidiary of Associated Communications Corporation, a publicly traded company with over 200 million in assets.

10. Finally, AIS contends that the public interest would be served by the continued development of its nationwide system because its implementation will result in extremely efficient spectrum utilization. It notes that its system is designed for one-way operation on unpaired frequencies, thus requiring less spectrum than a paired channel two-way system. It further asserts that the one-way error detection and correction functions that are performed by its data receivers increases transmission efficiency by eliminating the need for two-way signal verification or "handshaking." AIS thus reports that it is able to achieve data transmission rates that rival much broader band two-way transmission modes.

IV. DISCUSSION

11. The rules governing MAS operations were established in the early 1980's. *See Report and Order*, SS Docket No. 79-18, 46 Fed. Reg. 9,950 (1981) and *Second Report and Order*, SS Docket No. 79-18, 47 Fed. Reg. 6,896 (1982). This proceeding allocated thirty-four frequency pairs and eight unpaired frequencies specifically for MAS operations. MAS systems designed for one-way operation, such as AIS's systems, are licensed on unpaired MAS frequencies.

12. When this Commission initially allocated frequencies for MAS use, we anticipated that there would be a greater need for paired frequencies to accommodate two-way systems than for one-way operation. Our conclusions were based on industry projections. The recent development of one-way MAS applications, however, such as mobile meter reading and energy management Power Donut® systems,[5] have also placed a heavy demand on the limited available unpaired MAS frequencies. We recently concluded a review of our MAS policies and rules and took several actions to accommodate the increasing demands for MAS paired and unpaired frequencies. *Report and Order*, PR Docket No. 87-5, 3 FCC Rcd 1564 (1988). For example, we reduced the standard bandwidth for MAS frequencies from 25 to 12.5 kHz. Despite these actions, however, the available unpaired MAS spectrum remains insufficient to meet future one-way demands, particularly in major metropolitan areas.[6]

13. To ensure that the limited MAS spectrum is used, Section 94.51(a) of the Rules requires that MAS stations be placed in operation within 12 months of the date of the license grant. If the licensee is unable to meet this requirement Section 94.51(a) gives the licensee an opportunity to seek a reasonable extension of time to construct upon a showing of good cause. To this end, Section 94.51(a) provides that requests for extension of time must be submitted at least 30 days prior to the expiration of the 12 month construction and implementation period. If, however, the licensee fails to construct or to seek a timely extension of time, the license authorizations cancel automatically and must be returned to the Commission for reassignment to other applicants.[7] The timely extension request provision is a fundamental element of our channel recovery and reassignment policy. This provision encourages compliance with the one year operational requirement and places the obligation on those licensees that will not satisfy the construction requirement to come forward and seek timely extensions where necessary.

14. Given its failure to construct remote stations, AIS seeks a declaratory ruling that its construction of master stations only, without any associated remote stations to receive transmissions, substantially complies with the provisions of Section 94.51(a). Such an interpretation is plainly inconsistent with the purpose of our implementation rules in the microwave service. The purpose of Section 94.51(a) is to ensure that the limited number of frequencies assigned for MAS stations are put in prompt use. The construction of master stations without remote stations does not result in any authorized service. We conclude that AIS has failed to comply with the operational provisions of Section 94.51(a).[8]

15. We turn next to AIS's alternative request for waiver of Section 94.51(a) and concommitent extension of time to construct. In considering AIS's waiver request we must determine if this case presents unique circumstances that justify the relief sought. We must also consider whether a waiver would undermine the public interest policy the rule seeks to protect. 47 C.F.R. §§ 1.3, 90.151; *WAIT Radio v. FCC*, 418 F.2d. 1153,1157 (D.C. Cir. 1969); *Thomas Radio v. FCC*, 716 F.2d. 921 (D.C. Cir. 1983).

16. AIS failed to fully construct its authorized facilities or to request extensions of time for its licenses before the end of their various construction periods.[9] In fact, AIS took no action whatsoever to seek additional time to construct until our field inspections discovered its failure to comply. Only after these inspections, and follow-up meetings with Commission staff, did AIS file the instant request for declaratory ruling or alternate relief.[10] In other words, despite AIS' contention that it is committed to building these systems, it failed to take even the minimal actions necessary to maintain these licenses. Under these circumstances, the relief AIS seeks is simply not warranted. A licensee that ignores the requirements of our implementation rules and then seeks additional time to construct faces a very high burden to demonstrate that such relief should be granted. AIS has failed to meet this burden.[11]

17. Both this Commission and the Courts have consistently held that the consequences of independent business decisions do not release a licensee from its responsibilities to implement its stations in accordance with our rules. *See P & R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984).[12] *See also Texas Two - Way*, 98 FCC 2d 1300 (1984), *aff'd sub nom. Texas Two - Way, Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985). In addition, in *Business Radio Communications, Inc.*, 102 FCC 2d 714,716-17 (1985), this Commission confirmed that the automatic cancellation provisions of the rules would not be waived to the detriment of other applicants who wished to apply for limited spectrum when the licensee's failure to meet the con-

ditions of its license resulted from the outcome of its own business decisions. Section 94.51(a) assures that MAS frequencies that are not being utilized will be recovered by the Commission and reassigned to other applicants. Application of this policy is particularly important here because AIS's numerous unused authorizations represent a significant percentage of available one-way unpaired MAS spectrum (one unpaired channel of only eight unpaired channels per city, or 12.5 percent of the one-way MAS spectrum). AIS has tied up a substantial portion of the limited one-way MAS spectrum for several years to the exclusion of other applicants and requests yet another one and one-half years to make its system operational, i.e., until December 1989. Under these circumstances, the public interest requires enforcement of the license implementation requirements of Section 94.51(a).

18. AIS has, however, filed timely extension requests for five of its stations.[13] The timely extension request is the vehicle contemplated by the rule for seeking relief from the one year period and does not require a rule waiver. In light of this timely request and the factors explained above, we find that extending the time for implementation of these channels until six months from the release date of this Order would not unduly interfere with the public interest goal the rule is intended to promote.

19. Finally, an interference problem prevented AIS from placing stations WLH 65 in Los Angeles, California and WNEE 262 in Oxnard, California in operation in a timely manner. This problem was recently resolved. The licenses for these stations were initially granted on May 10, 1986. Since it is clear that this interference would have precluded AIS, or any other licensee at those locations, from placing these stations in operation, we shall treat AIS's request to retain these authorizations as timely requests for extensions of time. AIS, therefore, must place these stations in operation within six months from the date of this decision to avoid the cancellation of these licenses.

V. CONCLUSION

20. IT IS THEREFORE ORDERED that AIS's Request for Declaratory Ruling that the installation of master stations without remote stations substantially complies with the provisions of Section 94.51(a) of the Commission's Rules IS DENIED.

21. IT IS FURTHER ORDERED that AIS's request for waiver of Section 94.51(a) IS DENIED as to the stations listed in Appendix A. AIS must return the license documents for these stations to the Commission as required by Section 94.51(a) of the Rules.

22. IT IS FURTHER ORDERED that AIS's Request for Extension of time to place stations WNEO 668, WNEP 433, WNEI 760, WNEQ 611 and WNEE 861 in operation, filed in accordance with Section 94.51(a) of the Rules, IS GRANTED for a period of six months from the release date of this Order.

23. IT IS FURTHER ORDERED that an extension of time to place stations WLH 65 and WNEE 262 in operation IS GRANTED for a period of six months from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

ASSOCIATED INFORMATION SERVICES CORPORATION MAS LICENSES THAT HAVE CANCELLED AUTOMATICALLY

MARKET	CALL SIGN
BIRMINGHAM, AL	WNEE 261
MONTBOMERY, AL	WNEI 757
LITTLE ROCK, AR	WNEI 867
FLAGSTAFF, AZ	WNEJ 867
PHOENIX, AZ	WEG 746
TUCSON, AZ	WEG 714
BAKERSFIELD, CA	WNEK 211
FRESNO, CA	WNEE 263
SACRAMENTO, CA	WHK 549
SAN DIEGO, CA	WEH 462
SAN FRANCISCO, CA	WHI 729
SAN JOSE, CA	WNEE 271
SAN LUIS/OBISPO, CA	WNEI 766
COLORADO SPRINGS, CO	WNEI 772
DENVER, CO	WNEE 273
GRAND JUNCTION, CO	WNEI 774
PUEBLO, CO	WNEK 210
HARTFORD, CT	WNEI 770
WASHINGTON, D.C.	WHP 47
JACKSONVILLE, FL	WEF 771
MIAMI, FL	WLH 63
ORLANDO, FL	WHI 367
TALLAHASSEE, FL	WNEI 769
TAMPA, FL	WHI 659
WEST PALM BEACH, FL	WNEE 264
ATLANTA, GA	WEH 331
MACON, GA	WNEI 771
DES MOINES, IA	WEG 933
BOISE, ID	WNEJ 868
CHICAGO, IL	WHI 866
INDIANAPOLIS, IN	WEG 454
WICHITA, KS	WNEI 868
LOUISVILLE, KY	WNEI 869
BATON ROUGE, LA	WNEI 768
NEW ORLEANS, LA	WEG 464
SHREVEPORT, LA	WNEI 767
BOSTON, MA	WEH 838
BALTIMORE, MD	WGY 694
GRAND RAPIDS, MI	WNEI 870
KALAMAZOO, MI	WNEK 209
LANSING, MI	WNEK 208
DULUTH, MN	WNEI 765
MILWAUKEE, WI	WHI 368
ST. CLOUD, MN	WNEI 753
KANSAS CITY, MO	WNEE 272
ST. LOUIS, MO	WEH 908
JACKSON, MS	WNEJ 866
CHARLOTTE, NC	WNEI 871
RALEIGH, NC	WNEE 265
WINSTON-SALEM, NC	WNEJ 865
LINCOLN, NE	WNEI 754
OMAHA, NE	WNEI 756
ALBUQUERQUE, NM	WEG 932
LAS VEGAS, NV	WNEI 755
ALBANY, NY	WNEI 799

MINNEAPOLIS, MN	WEG 937
ROCHESTER, NY	WHI 366
SYRACUSE, NY	WNEI 866
AKRON, OH	WNEI 763
CINCINNATI, OH	WEH 750
CLEVELAND, OH	WNEO 257
COLUMBUS, OH	WNEI 872
DAYTON, OH	WNEI 502
OKLAHOMA CITY, OK	WNEE 268
TULSA, OK	WNEI 873
PORTLAND, OR	WNEE 270
PHILADELPHIA, PA	WEH 819
PITTSBURGH, PA	WEV 90
SCRANTON, PA	WNEI 762
PROVIDENCE, RI	WNEI 764
CHARLESTON, SC	WNEI 761
GREENVILLE, SC	WNEI 501
SIOUX FALLS, SD	WNEJ 864
KNOXVILLE, TN	WEG 745
MEMPHIS, TN	WNEE 269
NASHVILLE, TN	WNEK 256
DALLAS, TX	WED 676
EL PASO, TX	WEG 930
SAN ANTONIO, TX	WNEI 500
OGDEN, UT	WNEI 759
SALT LAKE CITY, UT	WNEI 800
NORFOLK, VA	WEG 455
SEATTLE, WA	WEH 545
SPOKANE, WA	WNEJ 863
MADISON, WI	WNEI 758
MILWAUKEE, WI	WHI 368

Associated Information Services Corporation MAS licenses for which six month extensions of time have been granted.

CLEARWATER, FL	WNEO 668
CEDAR GROVE, NJ	WNEP 433
COLUMBIA, SC	WNEI 760
HOUSTON, TX	WNEQ 611
MOBILE, AL	WNEE 861
LOS ANGELES, CA	WLH 65
OXNARD, CA	WNEE 262

FOOTNOTES

[1] A multiple address system is a one-way or two-way microwave radio system that normally consists of a fixed or mobile master station that receives or transmits in an omni-directional pattern to and from four or more fixed remote stations. 47 C.F.R. § 94.3.

[2] Section 94.51(a) provides that the authority to operate MAS stations that are not placed in operation within 12 months of the initial license grant cancels automatically. Requests for extension of time to construct must be submitted no later than 30 days prior to the expiration of this 12 month period.

[3] The Bureau has referred this matter to the full Commission in accordance with Section 0.331(a)(3) and (4) of the Rules, 47 C.F.R. § 0.331(a)(3) and (4), in view of the novel arguments raised by AIS concerning its alleged substantial compliance with the operational requirements of our rules.

[4] AIS constructed the master station and the requisite four remote stations for its New York station within one year of the initial license grant. This station was placed in operation for demonstration to potential AIS customers and has served as AIS's prototype station. Since the station was placed in operation in a timely manner, the license for this station did not cancel automatically. *See* note 9, infra.

[5] Power Donut® Systems employ one-way MAS technology by utilizing remote sensors that are clamped on power lines to transmit data automatically to receiving sites, without the use of master station interrogation.

[6] In recognition of the fact that the eight unpaired MAS frequencies may be inadequate to satisfy demand, we stated that we would consider rule waivers to allow one-way operation on paired frequencies in areas where unpaired spectrum was exhausted. Report and Order, PR Docket No. 87-5, *supra*, at para. 56.

[7] A Commission licensee accepts its license subject to the conditions imposed by the Commission's Rules. *See P & R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984). *See also Capital Telephone Co. v. FCC*, 498 F.2d 734, 740 (D.C. Cir. 1974).

[8] AIS emphasizes that the requirement that master stations must activate a minimum of four remote stations is not contained in Section 94.51(a). This requirement was initially announced in a 1985 Public Notice to clarify what constituted proper MAS construction. Public Notice No. 6107 (July 31, 1985). Shortly thereafter Section 94.3 of the Rules was amended to reflect the four remote station minimum requirement. Order, 50 Fed. Reg. 39,676 (September 30, 1985). AIS notes that at the time of this rule amendment, over 89% of its authorizations for the 93 cities in issue had already been issued. Notwithstanding this clarification and rule amendment, AIS's failure to construct *any* remote stations for its MAS stations in the three year period since July 1985 was clearly contrary to the provisions of Section 94.51(a) that require that MAS stations "must be in operation within 12 months from the date of grant or the authorization cancels automatically." Master stations with no remotes cannot relay information and are thus *not* in operation.

[9] AIS has, however, requested timely extensions for five of its stations as discussed in paragraph 18, *infra*.

[10] AIS filed this petition on June 15, 1987 even though some of its licenses had cancelled more than two years earlier.

[11] We do not intend to imply that we would never grant a waiver of the cancellation provision of Section 94.51(a) for a licensee who failed to file a timely extension request. We conclude here that this case does not present the unique and compelling circumstances that might provide the public interest justification necessary to support a waiver.

[12] In this case, the United States Court of Appeals for the District of Columbia Circuit affirmed this Commission's conclusion that problems associated with a licensee's choice of equipment manufacturer and transmitter location were circumstances within the licensee's control and did not provide an adequate basis for waiving the cancellation provisions of our rules for stations that failed to satisfy minimum loading requirements.

[13] These stations are WNEO 668 in Clearwater, Florida, granted on August 1, 1986; WNEP 433 In Cedar Grove, New Jersey, granted October 10, 1986; WNEI 760 in Columbia, South Carolina, granted December 12, 1986; WNEQ 611 in Houston, Texas, granted March 27, 1987; and WNEE 861 in Mobile, Alabama, granted August 3, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK CITY TRANSIT AUTHORITY — File No. L-2328

Petition for Reconsideration and Reinstatement

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1988; Released: September 1, 1988

By the Acting Chief, Private Radio Bureau:

I. INTRODUCTION

1. The Private Radio Bureau has before it for consideration petition filed by the New York City Transit Authority (Transit Authority). The Transit Authority seeks reconsideration of the cancellation of its licenses for 20 trunked channels in the Land Transportation Radio Service and reinstatement of its license authorizations. The channels were licensed for use in a city-wide bus radio system that would provide operational and emergency communications.

2. The Transit Authority's licenses were issued in February 1983, under call signs KNEH 690, KNEH 691 and KB 23096. Pursuant to the provisions of Section 90.629 of our Rules, 47 C.F.R. § 90.629,[1] we afforded the Transit Authority three years in which to place its system into operation. The fact that the Transit Authority did not meet this deadline is undisputed. By letter of July 2, 1987, the Private Radio Bureau notified the Transit Authority of its failure to meet this condition of its authorization and informed the Transit Authority that its licenses had cancelled in accordance with the provisions of Section 90.629(b).[2] This timely petition for reconsideration and reinstatement followed.

II. SUMMARY OF PETITIONS

3. In support of its petition, the Transit Authority cites both the circumstances underlying its failure to construct and the critical need for its proposed bus radio communications system. With respect to its reasons for delay, the Transit Authority maintains that emergency New York State transportation legislation of 1981 authorized a new, large and complex capital improvement program for New York City's deteriorating public transportation system. [3] The Transit Authority states that the aggregate value of capital contracts it awarded rose from approximately 720 million in 1983 to 1.1 billion in 1986, straining significantly the designing, planning and administration capabilities of its engineering department.[4] A major reorganization of that department further slowed development of the new bus radio system, the Transit Authority claims, as did its cumbersome competitive bidding procedures (subsequently revised) and many unexpected design problems.

4. Concerning its failure to file progress reports and a timely request for extension of time to construct, the Transit Authority contends that it believed in good faith that it was complying with Commission rules, but was misguided concerning the New York City agency responsible for Commission filings.[5] As result, the Transit Authority sent appropriate information to other City agencies with the belief that these agencies were responsible for forwarding it to the Commission. The information was not, however, sent to the Commission. In particular, the Transit Authority maintains that it relied upon New York City's Department of General Services to act as its agent in prosecuting all matters concerning this license, in light of that Department's past practice of routinely handling the Transit Authority's licensing matters before the Commission. Additionally, the reorganization within the Transit Authority resulted in different individuals becoming responsible for the construction and implementation of the bus radio system. This was time consuming, as the new personnel had to become familiar with the project.

5. Turning to the critical need for its proposed bus radio system, the Transit Authority states that its 4,000 buses carry approximately 500 million passengers annually on 203 local and 24 express routes.[6] The Transit Authority contends that effective communications are essential if this large and complicated system is to operate efficiently. For example, information must be conveyed between drivers and dispatchers as to the need to repair or replace broken down buses, to detour buses around hazards such as accidents or fires, to add extra buses where subways have broken down, and to summon help in emergencies.[7] The Transit Authority states that the system's current radio system is so antiquated and inadequate that bus drivers must use public telephones to seek assistance, and dispatchers must physically track down buses via private automobile. The Transit Authority states that given the size of New York City's bus system and its significance to the City's overall life and economy, this situation is intolerable. As a final matter, the Transit Authority states that it is prepared now to proceed with construction expeditiously and submits an implementation schedule to this end.

III. DISCUSSION

6. We conclude, under the unique circumstances presented here, that reinstatement of the Transit Authority's licenses for its proposed bus radio system is warranted. Accordingly, we grant the Transit Authority's request for waiver of Section 90.629 of our Rules. In making special provision for local government applicants, Section 90.629 acknowledges that the needs of these entities, and the special characteristics of their operations, may warrant a construction period longer than that afforded private individuals. The Transit Authority's efforts to implement its authorization -- marked by legislative changes, departmental reorganizations, procedural modifications, and bureaucratic misunderstandings -- amply illustrate the wisdom of this approach.

7. Although the Transit Authority believed that it was complying with the Commission Rules, its licenses for these channels in fact cancelled. Where licenses are cancelled for failure to meet loading and construction require-

ments, we grant waivers to permit reinstatement only upon the most compelling of showings.[8] Ordinarily, however, the interests are narrow ones because the channels are recovered from private individuals and become available for use by other entrepreneurs whose qualifications and proposed services are comparable to those replaced. *See , e. g. Associated Information Services*, FCC 88-267 and *Digital Radio Network*, FCC 88-268, both adopted August 4, 1988.

8. Where public safety issues are raised, however, the interests involved are quite different. Licensees in this area are not interchangeable, but are singular and special. Thus, loss of a license can mean total loss to the public of service vital to health and safety of a community. Here, for example, the proposed system is a unique one, involving the safety of millions of passengers on thousands of buses, and it is totally dependent upon retention of the 20 channels at issue. The safe and efficient operation of the urban mass transportation system for the largest city in the United States would be seriously compromised by cancellation of these licenses.[9] Under these circumstances, procedural deficiencies due to overlapping responsibilities of local government bodies do not outweigh the significant public interest considerations favoring construction of the bus radio system proposed here. We conclude, therefore, that the Transit Authority's licenses should be reinstated in accordance with the Transit Authority's revised implementation schedule.

9. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by the New York City Transit Authority IS GRANTED, subject to compliance with the revised implementation schedule.

10. IT IS FURTHER ORDERED that Section 90.629 of the Commission's Rules, 47 C.F.R. § 90.629, IS WAIVED to permit reinstatement of the licenses for stations KNEH 690, KNEH 691 and KB 23096.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Acting Chief, Private Radio Bureau

FOOTNOTES

[1] Section 90.629 provides, *inter alia*, an extended implementation schedule of up to three years for local governmental agencies required by law to follow a multi-year cycle for planning, approval, funding, and purchasing a proposed system. Applicants under this provision must submit an implementation schedule for the construction and loading of the facility and file annual progress reports. Authorizations under this section are expressly conditioned upon the licensee's compliance with its implementation schedule.

[2] Under Section 90.629(b), if a licensee fails to meet its implementation schedule and all channels in its geographic area are assigned, authority for trunked channels not loaded to 100 mobile stations cancels. Reinstatement of the Transit Authority's licenses requires waiver of this provision.

[3] Supplement to New York Transit Authority Petition for Reconsideration (Supplement), filed Nov. 17, 1987, at 11-16.

[4] Supplement at 12.

[5] Supplement at 2-3, 21-25.

[6] Supplement at 4.

[7] New York Transit states, in this regard, that 380 assaults and robberies were committed against bus operators during 198 Supplement at 6.

[8] *See , e. g.*, P & R Temmer v. FCC, 743 F.2d 918 (D.C. Cir. 1984).

[9] The instant case differs, in this respect, from that of the Southern California Rapid Transit District, where a request for waiver of Section 90.629 was denied for lack of both a specific showing of the public interest concerns involved and a detailed implementation schedule. *See* letter from Terry L. Fishel, Chief, Land Mobile Branch to Jeremiah Courtney, Esquire, January 29, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-408

In re Applications of

RADIO HABERSHAM, INC. (hereafter RH, Inc.)	File No. BPH-871023MO
CLARA MORRIS MARTIN (hereafter Martin)	File No. BPH-871026ML
HABERSHAM ASSOCIATES (hereafter Habersham)	File No. BPH-871026MM

For Construction Permit for a New FM Station in Clarkesville, Georgia Channel 275A (102.9MHz)

HEARING DESIGNATION ORDER

Adopted: August 8, 1988; Released: September 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Margaret M. Moore, principal of RH, Inc., is a management trainee at station WCHK(FM), Canton, Georgia. Joseph W. McClure, principal of RH, Inc., is a station manager at stations WRCG(AM) and WCGQ(FM), Columbus, Georgia. Both principals have indicated that in the event a construction permit is issued in this proceeding to RH, Inc., they will divest themselves of all interests in these three stations. Accordingly, an appropriate condition will be specified below.

3. RH, Inc. has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
RH, Inc.	February 5, 1988

4. Section II, Item 4 of FCC Form 301 (October 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. Habersham has not completed Item 4 correctly. Its application lists a post office box as the residence address of principal Margaret M. Moore. Accordingly, Habersham must submit an amendment which gives all the information required by Section II, Item 4, FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in the event a construction permit is awarded in this proceeding to RH, Inc., Margaret M. Moore and Joseph W. McClure, prior to commencing program test authority, will dispose of their interests in stations WCHK(FM), Canton, Georgia, WRCG(AM) and WCGQ(FM), Columbus, Georgia.

8. IT IS FURTHER ORDERED, That the petition for leave to amend fled by RH, Inc. IS GRANTED, and the corresponding amendment IS ACCEPTED to the extend indicated herein.

9. IT IS FURTHER ORDERED, That Habersham shall submit an amendment which contains the information required by Section II, Item 4, FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Southern New England Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1700

MEMORANDUM OPINION AND ORDER

Adopted: August 25, 1988; Released: September 15, 1988

By the Chief, Common Carrier Bureau:

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I. INTRODUCTION AND BACKGROUND

1. Pursuant to the *Joint Cost Order*,[1] on September 1, 1987, the Southern New England Telephone Company (SNET) filed a cost allocation manual governing the accounting separation of SNET's regulated and nonregulated costs. Consistent with the requirements of the *Joint Cost Order*, SNET implemented the manual on January 1, 1988, concurrent with the implementation of the revised Uniform System of Accounts (USOA).[2] The manual includes a description of SNET's overall costing methodology, a description of SNET's nonregulated activities, a list of activities SNET treats as incidental to regulated activities for accounting purposes, a section on transactions with affiliates, tables intended to show how each revised USOA account is allocated between regulated and nonregulated activities, and information on employee time reporting.

2. Two parties filed comments on SNET's manual, and SNET filed a reply. [3] In addition to reviewing the pleadings, we have conducted our own review of SNET's manual to determine its consistency with the Commission's rules and policies. We have concluded that SNET's manual is deficient in several major respects, and as a consequence does not provide the Common Carrier Bureau (Bureau) with a sufficient understanding of the proposed cost allocation procedures to permit us to make an informed judgment as to the ability of the manual to prevent cross subsidy. We conclude that, overall, SNET has not met the requirements of the *Joint Cost Order*, and therefore SNET's cost allocation manual cannot be approved as submitted. We require SNET to submit a revised manual within sixty days of the release date of this Order.

3. In filing its revised manual, we require that in several instances SNET specify in greater detail the procedures it intends to follow in allocating the costs and revenues between regulated and nonregulated activities, and in some cases, correct ambiguities and omissions in its manual. Following the submission of a revised manual, we shall solicit public comment and then issue a further order regarding SNET's cost allocation manual.

II. DISCUSSION

A. Overall Sufficiency of the Manual

4. Our primary problem with SNET's manual concerns the incorporation of two "adaptations" to the *Joint Cost Order* to fit SNET's particular circumstances.[4] The first of these "adaptations" is the application of a "capital carrying charge" for jointly-used regulated non-network support assets. According to SNET, this carrying charge recovers the cost of depreciation, provides a return on investment, and is charged to nonregulated activities for the use of regulated support assets such as land and buildings. SNET contends that this approach "leaves the ratepayers intact as the regulated company recovers its costs associated with the jointly used assets along with a corresponding rate of return."[5] Additionally, SNET states, the use of the carrying charge does not and will not cause any distortions in the apportionment of the assets.

5. The second "adaptation" is SNET's use of separate books of account for its nonregulated, nonstructurally separate divisions. SNET states that it will report to the Commission the amounts for the nonregulated activities performed in nonstructurally separate divisions, that it will separately identify these amounts, and that it will ensure that these amounts are auditable.

6. These two "adaptations" that SNET has incorporated into its cost manual are violations of the Commission's rules because they do not meet the requirements of the *Joint Cost Order*. Therefore, SNET is directed to amend its manual to remove them. The use of such "adaptations" is procedurally improper. The Commission rules and policies for the separation of costs between regulated and nonregulated activities were adopted after an extensive Rule Making proceeding. SNET may not unilaterally make basic changes to those rules and policies to fit its particular circumstances. SNET, like other parties, had an opportunity to advance such proposals during the *Joint Cost* proceeding, or, following the issuance of the *Joint Cost Order*, through a petition for reconsideration. At the very least, a party wishing an exception to a Commission order is expected to submit a petition for waiver of the particular Commission rule. For reasons not clear in the record, SNET did not see fit to follow these established procedures. Thus, from a procedural standpoint alone, SNET's "adaptations" are not permissible.

7. SNET's "adaptations" also are substantively inappropriate. SNET justifies its use of the "carrying charges" procedure on a 1984 Telephone Industry Advisory Group (TIAG) Report[6] and its use of separate books of account for nonregulated, nonstructurally separate divisions on the Commission's *Fifth Report and Order* in Docket 81-893.[7] Neither of these documents provides adequate grounds for us to allow SNET to depart from the Commission's established cost allocation methodology. The TIAG Report was a useful tool in providing guidance to the Commission for the revision of the USOA, but it was not an official Commission order directing telephone companies to follow particular accounting procedures. The *Fifth Report and Order*, which SNET cites as support for its use of separate books of account, is no longer applicable because that approach to accounting for nonregulated activities was superseded by the *Joint Cost Order*.[8] Accordingly, SNET is directed to eliminate the use of the two "adaptations" to the *Joint Cost Order* that it has incorporated into its cost allocation manual.

8. A second major problem concerns the lack of adequate detail and information in virtually all sections of SNET's cost allocation manual. The *Joint Cost Order* listed five types of information that must be included in cost allocation manuals: (a) a description of each nonregulated activity; (b) a list of all the activities the company now accords incidental accounting treatment, and the justification for treating each as incidental; (c) a chart showing all corporate affiliates; (d) a statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms and frequency of such transactions; and (e) for each USOA account and subaccount, detailed specifications of the cost categories (or cost pools) to which amounts in the account or subaccount will be assigned, and of the allocation method for each cost category (or pool).[9] In addition, the manuals must describe the methods used to teach, monitor, and enforce accurate time reporting, as well as the methods for capturing and allocating the costs of nonproductive time.[10] While SNET's manual contains individual sections pertaining to all of these subjects, each section contains significant deficiencies. Taken together, these shortcomings render SNET's cost allocation manual unacceptable. The deficiencies in the individual sections of SNET's cost manual are discussed in the following paragraphs.

B. Nonregulated Activities

9. The SNET manual provides the requisite description of its nonregulated activities.[11] SNET lists and describes two nonregulated activities that it offers: (1) SNET Voice Messaging, a service that allows a user to send, receive, reply to, redirect, and broadcast voice messages, and (2) Connet Enhanced Services, a nontariffed packet switched network service. Although SNET has listed and described its nonregulated activities as required by the *Joint Cost Order*, it has not met the requirements for accounting for these services. As mentioned above, SNET is using separate books of account to record the costs and revenues associated with these services, a practice which does not conform to the requirements of the *Joint Cost Order*. We direct SNET to amend its manual to account for its nonregulated activities in accordance with requirements of the *Joint Cost Order*.[12]

C. Incidental Activities

10. SNET's manual also provides, as required, a list of nonregulated activities that are offered on an incidental basis to regulated activities.[13] In the *Joint Cost Order*, the Commission permitted carriers to account for incidental activities as regulated activities, provided that the activities meet the following quantitative and qualitative tests: (a) the activity must be an outgrowth of regulated operations; (b) it cannot constitute a separate line of business; (c) it must have traditionally been treated as incidental for accounting purposes; and (d) the total of all incidental activities must not exceed one percent of a carrier's total revenues.[14]

11. Our review of the incidental activities section of SNET's manual reveals the need for additional information. First, while the manual states that SNET's incidental activities meet three of the above tests for incidental treatment,[15] SNET fails to address whether the total of all incidental activities is less than one percent of its total revenues. SNET must address all of the *Joint Cost Order* criteria before we can determine whether its treatment of these activities is in full compliance with the Commission's guidelines. Additionally, SNET does not provide sufficient information to enable us to determine the nature and scope of each activity proposed for incidental treatment. In this connection, SNET must clarify that "rental of surplus space on SNET premises" meets the Commission's requirements for incidental activities. To the extent that this is an activity that is provided to affiliates, it may constitute an affiliate transaction, and its costs must be recorded according to the affiliate transactions rules.

D. Affiliate Transactions

12. The *Joint Cost Order* establishes specific rules governing the provision of assets and services to and from affiliates. These rules were created in order to discourage carriers from avoiding the cost allocation rules through affiliate transactions. For example, if a carrier wished to cross subsidize a nonregulated activity, it could, in the absence of the affiliate transaction rules, engage in that activity through a separate but affiliated company which would receive assets or services from the carrier at prices less than the carrier's fully distributed costs. The affiliate transaction rules specify the valuation standards that will be applied in accounting for transactions between a carrier and its affiliates. Those rules vary depending upon whether the transaction involves assets or services.[16] The *Joint Cost Order* also required that carriers include in their cost allocation manuals "[a] statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms, and frequency of such transactions."[17]

13. Our review of the affiliate transactions section of SNET's cost manual leads us to conclude that it is impossible to determine if SNET is following the Commission's affiliate transactions rules. SNET's manual contains only a two-page table entitled "Description of Transactions with Affiliates," in which nothing more is provided than a listing of transactions that SNET has with affiliates. SNET does not explain whether these transactions involve assets or services, nor does its explain whether SNET is providing or receiving the asset or service. Moreover, SNET provides no information on the terms or frequency of the transactions. SNET must amend the affiliate transactions section of its manual to demonstrate compliance with the affiliate transactions rules of the *Joint Cost Order*. Suffi-

cient information must be provided to enable us to determine that SNET understands and has established procedures for full compliance with the Commission's rules.

E. Cost Apportionment Methodology

14. As stated in paragraph 8, *supra*, the *Joint Cost Order* required that for each USOA account, carriers must provide detailed specifications of the cost categories (or cost pools) to which amounts in the accounts will be assigned, and of the allocation method for each cost category (or pool). Section 7 of SNET's cost manual purports to show the methods it will use to derive cost pools and to apportion costs between regulated and nonregulated activities. On the first page of this section, SNET provides a one-page narrative entitled, "Cost Apportionment Methodology By USOA Account," which essentially provides only general information describing how the tables are designed. The rest of the section provides SNET's cost apportionment information in table format. This information does not provide the detailed information necessary for us to conduct a meaningful review of SNET's cost apportionment process.

15. A cost manual must provide, for each account or cost category, sufficient information to allow us to determine that the costs in that account or category are being allocated in accordance with the standards established by the *Joint Cost Order* and set forth in Section 64.901 of the rules. SNET's manual does not provide a sufficient description to allow us to evaluate the cost standards proposed in SNET's cost manual. For example, in several instances the manual states that the cost pool apportionment basis for an account is "Investment Value."[18] However, nowhere in the manual is the term "Investment Value" defined or described as it pertains to SNET's cost pool apportionment methodology. Similarly, the manual states that cost pools will be apportioned between regulated and nonregulated activities based on "Usage Study"[19] and "Relative Usage,"[20] but here again SNET provides no description of its "Usage Study," nor does it define "Relative Usage." These examples are found in the "Telecommunications Plant In Service" section of SNET's cost apportionment tables. Similar examples are found in other sections. In the "Operating Expenses" section of its manual, SNET uses the terms "Subsidiary Records"[21] and "Functional Analysis"[22] as its cost pool apportionment basis for numerous operating expense accounts, but does not define either of these terms. Without precise definitions of the meaning of these terms, we are unable to determine if SNET has met the requirements of the *Joint Cost Manual*. Accordingly, in its revised manual, SNET must explain the precise meaning of each phase or term, that is not otherwise apparent, that it uses in its cost apportionment tables.[23]

16. In addition to the corrective action we have directed above, we also note that the *Joint Cost Order* required that carriers submit allocation proposals for each USOA account.[24] Since that requirement would have mandated the allocation of amounts that are not used in the jurisdictional separations and interstate ratemaking processes, the *ARMIS Order* eliminated the allocation requirement for particular accounts.[25] Appendix C to that order listed for the first time the particular USOA accounts and subaccounts that would be subject to joint cost reporting. In addition, the Commission required carriers to report on six additional accounts used in the interstate ratemaking process. These additional accounts are: Account 2004, Telecommunications plant under construction-long term; Account 2441, Conduit Systems; Account 4120, Other accrued liabilities; Account 4360, Other deferred credits; Account 5050, Customer premises revenue; and Account 7150, Gains and losses from disposition of land and artworks.

17. Because the list released in the *ARMIS Order* was not available until after SNET filed its manual, the manual omits several accounts contained on that list. The manual also omits two of the six accounts listed above: Account 4120, Other Accrued Liabilities; and Account 4360, Other Deferred Credits. In preparing its revised manual, we direct SNET to include allocation proposals for each of the omitted accounts. If, in doing so, SNET finds that there are several accounts for which it has nothing to report, it must list these accounts in its manual and indicate that it has nothing to report.

F. Employee Time Reporting

18. The *Joint Cost Order* permits carriers to select from among several methods of recording employee time. The Commission reasoned that, since the use of wages and salaries would serve as an important technique in the allocation of costs, it was important that carriers use accurate methods of recording employee time. The Commission further found that no one time reporting system would provide accurate results in all situations. Carriers were therefore free to propose the use of positive time reporting or exception time reporting, or to develop special studies to keep track of employee time. The *Joint Cost Order* also required that carriers include in their manuals a description of the methods used to teach, monitor and enforce accurate time reporting. In addition, carriers must also describe methods used to capture the costs of nonproductive time and the methods used to allocate those costs.[26]

19. In its cost manual, SNET proposed using three time reporting methods: positive time reporting, exception time reporting and supplemental time reporting.[27] There were no comments filed regarding SNET's time reporting procedures and methods.

20. We have identified several problems with SNET's explanations of its time reporting methods. First, SNET must be more specific about which groups of employees use the various time reporting methods. For example, under its discussion of "Positive Time Reporting," SNET states that its Current Time Reporting (CTR) system " . . . handles the reporting of time for non-craft employees working in the Plant, Switching and Support Services on an exception basis."[28] SNET also states that these employees include district clerks, secretaries and equipment clerks.[29] Under its discussion of "Exception Time Reporting," however, SNET states that "[E]xception time reporting is used, for the most part, by staff personnel in the customer and corporate operations areas." It is unclear to us whether the non-tariff employees working in Plant, Switching, and Support Services are reporting on a positive or exception basis. Additionally, under the heading of "Supplemental Time Reporting," SNET discusses time reports that are utilized by a "variety of groups," but it does not identify these groups. In its revised manual, SNET must explain which groups of employees use each of the time reporting systems and why. SNET must also state, in

its revised manual, whether any of its employees will be exempt from time reporting, and if so, the basis for the exemption.

21. Second, SNET must provide more detail on its "Supplemental Time Reporting." For example, SNET implies that it uses several time reporting mechanisms under this heading, but mentions only one involving field operations within the marketing department and one involving special studies. SNET must list and explain all of the time reporting systems that it utilizes, and for those involving special studies, it must describe the scope of such studies, an overview of their methodology, and the frequency with which they occur.

22. Finally, we require SNET to provide more information on the costs of nonproductive time. Although SNET described the methodology it uses to capture these costs, in does not explain how these costs are apportioned between regulated and nonregulated activities. SNET must amend its manual to provide this information.

G. Other Issues

23. In the *Joint Cost Order*, the Commission required jointly-used network plant (central office equipment and outside plant) to be allocated on a forecast of the peak relative nonregulated usage of the plant over its entire depreciable life. The Commission elected to adopt a forecasted use approach in order to reflect the nature of capital investment decisions, *i.e.*, that investment decisions are made in anticipation of future use.[30] On reconsideration, the Commission reduced the length of the forecast period to three years in recognition of the practical difficulties of forecasting relative use over a lengthy depreciation period.[31]

24. SNET states that none of its nonregulated activities currently shares any regulated central office equipment or outside plant, and therefore its cost manual does not include any shared network plant costing methodology.[32] SNET also states that tariffed services provided to a nonregulated activity are charged to the nonregulated activity at the tariffed rate.[33]

25. One party -- IBM -- commented on the absence of forward-looking allocator for joint use of network plant in SNET's cost manual. IBM notes that although SNET does not currently intend to use network plant jointly, and will provide transmission services used in its own nonregulated activities at tariffed rates, it should be required to revise its cost manual to implement the principle of allocation of investment risks before it begins to share investments.[34]

26. In response, SNET states that if and when it plans to incur any shared regulated and nonregulated use of network plant investment, it will file the requisite addenda to its cost manual.[35]

27. We agree with SNET's current treatment of network plant. Since SNET currently is not sharing network plant for the provision of regulated and nonregulated services, we see no need for it to have a forward-looking allocator.[36] However, if SNET's three-year forecasts of future operations indicate a planned sharing of network plant for regulated and nonregulated services, SNET must amend its manual to provide for a forward-looking allocator. We direct SNET, however, to describe the equipment it will use to provide its voice messaging service.

III. PROCEDURAL ISSUES

28. We have reviewed the cost allocation manual of eleven local exchanges carriers (LECs), or their parent companies, and in each case we have conditionally approved the manuals subject to the filing of additional information.[37] In those cases, however, we were able to determine that the carriers had integrated the basic costing principles set forth in the *Joint Cost Order* into their manuals, and that we had sufficient information about their procedures to assure us that, overall, the manual would discourage cross-subsidy.[38] The additional material we required each carrier to file was in the nature of explanations of unclear areas, additional information about existing procedures, or allocation procedures for specific accounts that were more cost-causational. The problems in SNET's approach to costing, however, as described in paragraphs 4-7, *supra*, are of a different and more serious nature. We are not dealing here solely with questions about how clearly SNET has described its implementation efforts. Rather, we also find that SNET's "adaptations" to the Commission's rules are clear violations of the requirements of the *Joint Cost Order*. Moreover, several sections of its manual make it impossible to determine whether SNET is complying with the *Joint Cost Order*. Accordingly, we may not even conditionally approve the manual; we must disapprove it.[39]

29. As noted above, we require SNET to submit a revised cost allocation manual to correct major deficiencies in its cost allocation tables. We also direct SNET to submit additional information concerning its affiliate transactions, incidental activities, and time reporting mechanisms. In the *Joint Cost Order*, the Commission specifically provided for public comment on the manuals so that a determination on their compliance with Commission requirements would be based on a full record and so that the cost allocation methodologies would be exposed to public scrutiny prior to their implementation.[40] Similarly, we believe that our review of SNET's revised manual will be aided by public comment thereon.

30. We will evaluate the revised manual, as well as the comments that we receive, before issuing a further order on SNET's manual. If we disapprove a proposed revision, we shall take whatever further action is required, including mandating specific allocation methodologies or other procedures, consistent with our delegated authority to implement cost allocation manuals. In addition, to facilitate our review of the revised manual and its availability to the public, SNET must file two copies of its revised manual with the Commission in looseleaf form within 60 days of the release date of this Order.[41]

IV. ORDERING CLAUSES

31. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the Cost Allocation Manual filed by SNET IS DISAPPROVED.

32. IT IS FURTHER ORDERED that a revised Cost Allocation Manual shall be submitted within 60 days from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *petitions for further recon. pending.*

[2] 47 C.F.R. Part 32.

[3] Comments were filed by: American Telephone and Telegraph Company (AT&T) and International Business Machines Corporation (IBM).

[4] *See* Letter from Terry O. Oulundsen, Vice President, Regulatory Affairs, SNET, to William J. Tricarico, Secretary, Federal Communications Commission, dated September 1, 1987 (*Oulundsen Letter*).

[5] *Id.*

[6] *Id.* at 2, *citing* TIAG Definitions and Rules Subcommittee, "Determination of Nonregulated Costs in Regulated Entities", September, 1984 TIAG Report.

[7] *Id. citing* Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), Fifth Report and Order, FCC 84-547, 49 Fed. Reg. 46378 (Nov. 26, 1984) (*Fifth Report and Order*).

[8] *Joint Cost Order*, 2 FCC Rcd at 1300.

[9] *Id.* at 1328. The *Joint Cost Order* uses the terms "cost categories" to describe groupings of costs that are homogeneous in nature for cost allocation purposes. The accounting profession's term for "cost categories" is "cost pools." We will use the two terms interchangeably in this Order.

[10] *Id.* at 1321-22.

[11] SNET Manual at Section 3.

[12] Moreover, under its discussion of its nonregulated activities, we note that SNET has not listed any activity relating to customer premises equipment (CPE) or inside wire. In its revised manual, SNET must clarify that it does not engage in any nonregulated activities in these areas.

[13] SNET Manual at Section 4.

[14] *Joint Cost Order*, 2 FCC Rcd at 1328.

[15] *See* paragraph 10, *supra*.

[16] *See Joint Cost Order*, 2 FCC Rcd at 1355; *Reconsideration Order*, 2 FCC Rcd at 6295. Carriers must value services at the prevailing price, if the service is generally available to the public. If it is not generally available, carriers must allocate the cost of the service pursuant to the cost allocation standards of Section 64.901 of the Commission's rules. For assets, carriers must record transactions at the prevailing price, if one exists. If not, carriers must record assets transferred from the affiliate to the carrier at the lower of net book cost and fair market value, while assets transferred from the carrier to the affiliate will be recorded at the higher of net book cost or fair market value. *Joint Cost Order*, 2 FCC Rcd at 1343, 1345, *amended by Reconsideration Order*, 2 FCC Rcd at 6308-09.

[17] *Joint Cost Order*, 2 FCC Rcd at 1328.

[18] *See e.g.*, SNET Manual at Section 7, Account 2111, Land; Account 2112, Buildings; Account 2121, Buildings; Account 2124, General Purpose Computers; Account 2212, Digital Electronic Switching; Account 2232, Circuit Equipment; Account 2681, Capital Leases; and Account 2682, Leasehold Improvements.

[19] *See, e.g., id.* Account 1220, Materials and Supplies.

[20] *See, e.g., id.*, Account 2111, Land; Account 2112, Motor Vehicles; Account 2121, Buildings; Account 2124, General Purpose Computers; Account 2681, Capital Leases; and Account 2682, Leasehold Improvements.

[21] *See, e.g., id.*, Account 6112, Motor Vehicle Expense; Account 6121, Land and Building Expenses; and Account 6124, General Purpose Computer Expense.

[22] *See, e.g., id.*, Account 6611, Product Management; Account 6612, Sales; Account 6613, Product Advertising; Account 6623, Customer Services; Account 6711, Executive; Account 6721, Accounting and Finance; Account 6722, External Relations; Account 6723, Human Resources, Account 6724, Information Management; Account 6725, Legal; Account 6727, Research and Development; and Account 6728, Other General and Administrative.

[23] We note that AT&T submitted comments concerning several specific accounts contained in the cost apportionment tables, and that SNET replied to those comments. Since we are requiring SNET to filed a revised manual containing major revisions, particularly in its cost apportionment tables, we will not address AT&T's comments at this time. If AT&T, or any other party, has comments on SNET's revised manual, those comments should be filed in accordance with Commission rules, and we will address them in our review of SNET's revised manual.

[24] *Joint Cost Order*, 2 FCC Rcd at 1328.

[25] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, Report and Order, 2 FCC Rcd 5770, 5775 (1987), (ARMIS Order), petitions for reconsideration pending.

[26] *Joint Cost Order*, 2 FCC Rcd at 1321-22.

[27] SNET Manual at Section 8.

[28] *Id.* at Section 8, p.1.

[29] *Id.*

[30] *Joint Cost Order*, 2 FCC Rcd at 1319.

[31] *Reconsideration Order*, 2 FCC Rcd at 6288.

[32] *See* Oulundsen Letter at 2.

[33] SNET Manual at Section 2, p. 1.

[34] IBM Comments at 4, n. 4.

[35] SNET Reply at 2.

[36] This is consistent with our requirement that Bell Atlantic amend its manual to eliminate hypothetical allocations for shared use of network plant that does not exist. *See* Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 109, 116 (1988)(Bell Atlantic Order).

[37] *See, e.g., id.* at 109.

[38] *See, e.g., id.* at 110.

[39] This procedure is similar to that which we used for AT&T. *See* Cost Allocation Manual for the Accounting Separation of the Regulated and Nonregulated Costs of AT&T Communications, 2 FCC Rcd 6020 (1987). There we rejected a cost allocation manual because it lacked necessary detail concerning an essential element of the Joint Cost Order (network plant allocation). *See also* National Exchange Carrier Association, Inc.'s Cost Allocation and Procedures Manual, 3 FCC Rcd 4333 (1988) (manual disapproved because it contains two, apparently irreconcilable, cost apportionment systems).

[40] We require SNET to serve copies of its revised manual on all parties to the SNET manual proceeding.

[41] One copy will be made available in the Accounting and Audits Division reference room, while the other will be maintained for staff use.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-293

In re Applications of

Minnie O.Foulk and Renee Ridley Biselli, d/b/a WASHOE SHOSHONE BROADCASTING, A Limited Partnership	File No. BPCT-850328KE
RENO-ELEVEN TELECASTERS	File No. BPCT-850509KH
RENO MINORITY BROADCASTING CORPORATION	File No. BPCT-850509KJ
PAGE ENTERPRISES INC. (KAME-TV)	File No. BMPCT-850509KQ
RENO COMMUNITY BROADCASTING CO. A Nevada Limited Partnership	File No. BPCT-850509KS
NEVADA TELEVISION CORPORATION	File No. BPCT-850509KU

For Construction Permit for a New VHF Television Station at Reno, Nevada

MEMORANDUM OPINION AND ORDER

Adopted: September 9, 1988; Released: September 23, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Now before the Board are Petitions for Reconsideration filed by Reno-Eleven Telecasters (RET) and Reno Minority Broadcasting Corporation (RMBC), pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106, seeking reconsideration of our *Decision* in this proceeding, 3 FCC Rcd 3948 (Rev. Bd. 1988). On August 24, 1988, RMBC filed a "partial opposition" to RET's petition; RET, in turn, has opposed RMBC's petition. Nevada Television Corporation (NTC)(the prevailing applicant) has opposed both petitions, and the Commission's Mass Media Bureau has filed an opposition to RMBC's Petition for Reconsideration. Reno Community Broadcasting Company (RCBC) has filed " Comments in Partial Support" of RMBC's Petition. Replies have been submitted by RMBC and RET.

2. RMBC principally seeks reconsideration of the decisive comparative coverage aspects of our *Decision*. RET essentially limits its petition to consideration of its denial of ownership/management integration credit.

3. *RMBC* : In the Board's *Decision*, *supra*, 3 FCC Rcd 3948-3952 (paras. 3-13), we examined at length the comparative coverage aspects extant in this proceeding. Briefly, we noted that an existing licensee of a VHF television station in Reno (Sarkes Tarzian, Inc. (STI)) had, commencing some five years ago, twice advanced arguments to the Commission to prevent the addition of the Channel 11 allocation at issue herein, claiming, in essence, potential inadequate coverage to the area because of terrain factors. The Commission twice rejected these STI arguments. Thereafter, in the hearing proceedings below, although all parties participated in, and collectively sponsored a Joint Engineering Exhibit,

> [f]ollowing the parties submission of the Joint Engineering Exhibit, and despite their specific notice of the Commission's prior disposition of the engineering data contained in the proposals and counterproposals proffered over a period of some three years by STI, two of the applicants, RCBC and RMBC, now distancing themselves from the Joint Engineering Study that they had subscribed to, again interposed the same STI engineering study already considered twice, and rejected twice, by the Commission at the Rule Making stage to *rebut* the joint coverage areas and population figures contained in the Joint Study. As recapitulated at length, *supra*, STI originally commissioned the preparation of those engineering reports to support its own self-interested attempt to prevent assignment of a competitive television channel to Reno in favor of its alternative proposal to assign the frequency to Redding, California (RCBC Exhs. 6, 8). STI, it is recalled, had argued to the Commission that a Channel 11 site on Peavine Peak could not yield any first or second service to the Susanville vicinity - the very same argument that RCBC and RMBC reiterate in this proceeding (RCBC Exhs. 6, 7, 8).

Decision at 3950. Now in its Petition for Reconsideration, RMBC again rehashes essentially the same arguments it has advanced at virtually every stage of this proceeding (*i. e.*, that the terrain between NTC's proposed site and Susanville, California, will prevent requisite television reception in Susanville).

4. Clearly, it is well-established that petitions for reconsideration will not be granted "merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken." *WWIZ Inc.*, 37 FCC 685,686 (1964), *aff'd sub nom. Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *Magdalene Gunden Partnership*, 3 FCC Rcd 488 (Rev. Bd. 1988). However, RMBC now seeks to add to the record (to buttress its position) an alternative engineering statement described as "The RMBC Susanville District Terrain Study," purportedly prepared pursuant to "Tech

Note 101." [1] RMBC, however, admits (Petition at para. 9) that this study "has not previously been before the Commission or the Board."

5. Section 1.106(c) of the Commission's Rules, 47 C.F.R. 1.106(c), referencing 47 C.F.R. § 1.106(b)(2), provides that such engineering data purporting to disclose new facts may only be considered under certain limited circumstances in a petition for reconsideration:

> (1) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;
>
> (2) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity; and,
>
> (3) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest.

6. Herein, there are obviously no "changed circumstances" that have occurred since the issuance of the *Initial Decision*, 2 FCC Rcd 5362 (1987)(I.D.) or the Board's *Decision*. As RMBC concedes (Petition at fn. 4):

> . . . .Reno Minority was confident that the existing record evidence provided sufficient data from which to calculate NTC's true "white area" population, [a] position confirmed by the attached Tech Note 101 Study of the areas and populations at issue in this case.

7. It is settled that the Commission shall refuse to grant petitions for reconsideration where additional engineering data submitted does not reveal newly-changed circumstances. In *Central Coast Television*, 3 FCC 2d 524 (1966), the Commission denied a petition for reconsideration where a party attempted to introduce an engineering study purporting to show that intervening mountain peaks prevented a Santa Maria, California television station from rendering adequate service within its predicted Grade B contour. The Commission there held (*id.* at 525; emphasis added):

> Under section 1.106(c) of the rules, a petitioner who predicates a request for reconsideration of an order on facts not previously submitted to the Commission must establish either that such facts relate to new or changed circumstances or that they were previously unknown to petitioner and could not have been ascertained through the exercise of ordinary diligence. Manifestly, the engineering exhibit does not relate to new or changed circumstances, and the petitioner has made no effort to explain its failure previously to submit the terrain limited contours in support of its claimed right to file the petition to deny . . . . Key not only failed to submit an engineering statement concerning the effect of intervening mountains on the area of grade B coverage, but the contours which it did submit were calculated in accordance with the prediction method of section 73.684. Now that the Commission's determination has been adverse to Key, it proposes to try a different approach and to rely on a new engineering showing. This it cannot do. If Key had intended to rely on the existence of intervening mountain peaks or other terrain factors as establishing a major change, *it was incumbent upon the petitioner to come forward with the necessary showing* in support of its petition to deny. This it failed to do, and its petition is subject to denial for this reason alone.

See also Community Service, Inc., 12 FCC 2d 15(1968) (Commission denies petition for reconsideration where no new changed circumstances warranted introduction of engineering study). Nor can RMBC claim that its study relies on new facts it could not have secured heretofore at numerous junctures in this proceeding. *See Southeast Arkansas Radio, Inc.*, 61 FCC 2d 72 (1976) (reconsideration denied where evidence could have been discovered with due diligence). Or, as the Commission declared in *Nick J. Chaconas*, 35 FCC 2d 698, 700 (1972):

> The purposes of administrative finality are not served by entertaining petitions for reconsideration or petitions to reopen the record which are submitted only to correct oversights in the presentation of a particular case. Section 405 of the Communications Act of 1934, as amended, and also Section 1.106(c) of our Rules, are couched in terms which are designed to promote administrative finality. Thus, Section 405 provides that on any rehearing no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken. As we view the pleadings and affidavits which have been submitted, they are in no sense newly discovered evidence, but, rather, evidence which was easily discoverable initially and apparently only now deemed crucial by Chaconas when seen from the "highland of hindsight." *Guinan Realty Company v. FCC*, 111 U.S. App. D.C. 371, 297 F.2d 782 (1961).

And, as the court declared many years ago in *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941):

> Appellant took its chance that the Commission, on the existing record, would [reverse its position]. Now that the decision has gone against it, the appellant wants a chance to persuade the Commission with a supplemental record. We cannot allow the appellant to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

8. Apart from the procedural deficiencies of RMBC's study, we are also in essential agreement with the objectors that the additional engineering data submitted by RMBC is also far from complete. The Commission's Mass Media Bureau correctly asserts (Opposition at para. 5):

Similarly, we oppose any consideration of Reno Minority's so-called Tech Note 101 study, which it appends to its petition for the first time. Even if the study were a proper supplemental showing, which it is not, its appearance at this time is impermissibly untimely. *See Mark L. Wodlinger*, 3 FCC Rcd 3138 (Rev. Bd. 1988) . . . . Moreover, this latest study is flawed in the same respect as Reno Minority's earlier proffers. Specifically, it does not set forth the areas and populations which would be served by each applicant under the alternative method. It does not disclose the effect of shadowing upon Reno Minority's own claimed grey area service, a fact which it concedes. Finally, it does not show the effect of shadowing upon predicted service by existing stations and whether new underserved areas would emerge. The new study does no more than urge elimination of the white area service credited to two applicants in the Joint Exhibit. Thus, it is incomplete in the same manner as Reno Minority's original supplemental showing and the Bureau would object to its introduction into the record even if it were timely.

9. More specifically, NTC submits an Engineering Statement from its consulting engineer which similarly highlights some of the deficiencies in RMBC's study. As we stated in our *Decision*, the prior "Tech Note 101" studies "did not take into account the entire proposed coverage area, nor did it reveal the areas and populations which would actually receive service from *any* party's application determined by this methodology of calculation." 3 FCC Rcd 3950. Thus, NTC properly observes that RMBC's new study is similarly incomplete. It applies a "Tech Note 101" analysis only to a small portion of NTC's proposed coverage in the Susanville area, to attempt to controvert NTC's showing of service to the Susanville area, but does not apply "Tech Note 101" methodology to RMBC's proposed service area; to the proposed service areas of all of the other applicants; nor to the existing stations that delineate the extent of the white area (NTC Eng. Stmt. at 2). Rather, RMBC relies upon the standard FCC prediction methodology for determining its proposed Grade B service, and for all of the other applicant's Grade B contours defining the "white area." *Id.* In a mountainous area, such as present here, the standard Commission methodology generally will predict a larger service area than the alternate "Tech Note 101" method. Thus, claims NTC, RMBC has applied "Tech Note 101" to denigrate NTC's proposal, while continuing to favor itself by relying on the Commission's standard prediction method for defining its proposed service and "white area." *Id.*

10. Further, NTC correctly observes that RMBC has not supplied sample calculations with its "Tech Note 101" analysis as required by Section 73.684(f) of the Commission's Rules, 47 C.F.R. §73.684(f). (NTC Eng. Stmt. at 5). Such calculations are required before an alternative propagation study such as a "Tech Note 101" analysis can be considered. NTC claims that in the absence of such calculations, it is not possible to verify the accuracy of RMBC's signal strength predictions without engaging in certain assumptions. NTC further claims that because such calculations were not provided in RMBC's supplemental enginering statement, the alternative study must be rejected pursuant to Section 73.684(f). Also, RMBC did not conduct any detailed study of the topography to determine the rounding factor to be utilized in computing the strength of NTC's signal in the Susanville area. (NTC Eng. Stmt. at 5-6). NTC argues that a correction factor must be employed to compute the signal strength because of the effect on the signal strength of the roundness of the mountains. In employing a "Tech Note 101" study in areas where there are terrain obstructions, the correction factor should be determined based on an evaluation of the actual curvature of the mountains between NTC's transmitter site and the "white" area. RMBC's consulting engineer failed to evaluate the actual curvature of the mountains allegedly obstructing NTC's signal in the Susanville area. Instead, RMBC arbitrarily applied a correction factor of 10 dB. Consequently, NTC submits, RMBC's predictions of NTC's signal strength in the Susanville area using the Tech Note 101 study may be erroneous by as much as plus or minus 10 db. [2]

11. It would appear that the only logical and meaningful method of determining "white area," "grey area," and complete coverage area of the various facilities proposed herein by a so-called alternate "Tech Note 101" study would be to (1) accurately plot the coverage area of each and every extant television signal in the Reno area utilizing this "alternate" methodology and (2) similarly plot the proposed coverage area of each of the applicants in this proceeding, including a specific showing of the areas and populations which would, or currently do, receive television service. Only then could some possible meaningful determination be made as to "white" and "grey" area taking into account irregular terrain. All that is present in the record at this juncture is simply a melange of "apples and oranges" comparisons of purported coverage areas prepared pursuant to the "standard prediction" method (Section 73.684 of the Commission's Rules, 47 C.F.R. §73.684) (*see* Joint Engineering Exhibit subscribed to by all parties), as well as some partial and incomplete "Tech Note 101" showings previously made by STI (which have been twice rejected by the Commission) and relied upon yet again by RCBC and RMBC. [3] Now, of course, we are offered the additional flawed study of RMBC. Thus, we reiterate the cogent argument of Bureau counsel at oral argument and concur that there has been a complete failure of proof that the Commission's "standard prediction" method of calculating proposed coverage area is materially inaccurate or is inapplicable in this proceeding. As restated in the *Decision* (3 FCC Rcd at 3951):

> [*Bureau Counsel*]: . . . In a hearing proceeding, when we have a comparative coverage issue, you come in with the evidence, you come in with experts, you come in with evidence that is more or less reliable. And we have what we still call Technote 101 showings.
>
> * * *
>
> *What* [*the applicants*] *did not do was take the next step and come in with the alternative projection method, with the alternative contours or areas and* [*populations*] *figures ; that is to say it's a failure a proof ; they did not meet the issue as it was set forth in the designation order.*

12. However, this is not to suggest that the record should be reopened at this juncture to permit such a showing to be made. With further reference to "apples and oranges," RMBC has demonstrated no justification for belated bites at the former. As our *Decision* discussed at length (*id.*):

> In the case at bar, we conclude that we are bound by the evidence contained in the Joint Engineering Exhibit in this proceeding. No probative evidence has been submitted to persuasively demonstrate that the computations contained therein are materially inaccurate or otherwise unreliable. More importantly from our subordinate standpoint, the Commission itself has *twice* considered and *twice* rejected the very same engineering data submitted again to rebut the calculations contained in the Joint Engineering Exhibit.

13. In sum, RMBC has not submitted persuasive arguments to alter our *Decision* concerning comparative coverage of the applicants. Nor has it demonstrated that the record should be reopened for the further exploration of its engineering claims. With respect to its very brief rehash of the integration credit awarded RMBC principal Gus Nunez, RMBC admits that its submission in this regard is made "only so that no issue of waiver may later be raised" (Petition for Reconsideration, p. iv). Thus, we decline the invitation to address again this matter which has been extensively reviewed in our *Decision*. Similarly, we need not revisit our determination that the substantial comparative coverage preference awarded NTC outweighs the integration credit adhering to RMBC. *WWIZ, Inc., supra.*

14. RMBC also takes issue with the *Decision*'s apparent failure to address other video services allegedly present in the "Susanville District" via translator and cable television service to mitigate "white area." While claiming it will move to supplement the record with translator and cable television service data taken from *Television and Cable Factbook* [*No. 56*], RMBC observes that the impact of such services in this proceeding "is uncertain as a legal matter . . . ."(Opposition, para. 10). *Au contraire.* As we recently opined in *Vela Broadcasting Corp.*, 2 FCC Rcd 3663, 3666 (Rev. Bd. 1987):

> . . . [T]he Commission has rejected consideration of the availability of alternative services in assessing the extent of any underserved areas in the context of a comparative proceeding for a new broadcast station . . . *Apogee, Inc.*, 59 RR 2d 941, 945 (1986).

See also Daytona Broadcasting Co., Inc., 101 FCC 2d 1010, 1014 (1985). ("In brief, the Board was correct in not including service provided by . . . cable television systems in its assessment of the applicant's comparative signal coverage"). Hence, RMBC's petition for reconsideration will be rejected.

15. *RET.* RET's application was denied because it lagged comparatively behind NTC on the quantitative integration factor (35% versus 0%), enhanced by other cognizable attributes. RET's integration proposal was not credited predicated on two separate and distinct grounds. First, in concluding that *Cotton Broadcasting Co.*,104 FCC 2d 473, 475-477 (Rev. Bd. 1986) was controlling, the Board found that no ownership/management integration credit could be awarded to RET because that applicant's three "general" partners were simultaneously "limited" partners, and RET's limited partnership agreement expressly prohibited "limited" partners from voting on partnership business and from being involved in its day-to-day affairs. 3 FCC Rcd at 3954. In *Cotton*, the Board underscored the contradictory nature of the terms of the partnership agreement there in question, pointing out that on the one hand the agreement deprived a partner of all managerial authority, while, on the other hand, it authorized the same principal to be a general partner with "complete and exclusive" managerial authority. 104 FCC 2d at 476. The Board opined further: "[w]hether or not [such] a Janus-like arrangement comports with [state] law, it cannot be countenanced for ownership integration credit. We are compelled to take the [applicant's] limited partnership agreement at its word and to treat [that principal] as a limited partner for ownership integration purposes." *Id.* The second ground for denying RET's integration credit was the active participation in RET's corporate affairs played by "limited" partner Gary Krone, proposed to be a "non-integrated" principal at RET's facility. *Decision*, 3 FCC Rcd at 3954, 3955. The *Decision* details the activities of Krone which convinced the presiding officer and the Board that Krone could not be considered a "passive" investor for integration purposes since he had exercised important *de facto* control over RET's affairs. *Id.*

16. RET challenges both grounds in its Petition for Reconsideration. With respect to the first basis, RET contends that its integration proposal should be governed by *Houston Family Television, Ltd.*, 101 FCC 2d 661 (Rev. Bd. 1985), rather than *Cotton Broadcasting Co.* ; that *Cotton* itself is inconsistent with both state law and the principles of limited partnership law and should be overruled; and that our result (and *Cotton)* is inconsistent with the record evidence concerning the conduct of its general partners and with cases that purportedly focus on conduct in ascertaining whether an arrangement is *bona fide.* As for the second basis of our *Decision*, RET reargues that the record evidence does not support a finding that Krone exercised *de facto* control over RET.

17. RET's Petition for Reconsideration will be denied. At the outset, we reaffirm our earlier conclusion that *Cotton*, rather than *Houston Family*, is controlling here. The decisive factor in the case at bar, as it was in *Cotton*, is that the integration proposals of RET's general partners (who as noted, are also limited partners), are totally at odds with the express prohibitions contained in the applicant's own partnership agreement, *i. e.*, "the 'limited partners' [shall] refrain from involvement in any material respect in the management of any station owned by the partnership." I.D. at para. 42. By way of contrast, in *Houston Family* there was no similar language in the applicant's governing document that undermined the operational and managerial authority of the general partner that also owned some equity as a limited partner. And, in any event, the dual roles of the general partner in *Houston Family* were not squarely presented to, or addressed by, the Board in that case. Thus, the contention is without force that *Houston Family* is controlling here. RET's second claim (that *Cotton* is inconsistent with state law and the principles of limited partnership law) is also unavailing since that argument is not relevant here. We have previously stated on various occasions, *see e. g., Mark*

L. Wodlinger, 3 FCC Rcd 3139, 3240 (Rev. Bd. 1988) (and cases cited therein), that the object underlying the Commission's assessment of integration proposals is not synonymous with that of state law; or, more particularly, partnership law, and thus neither state law nor conventional partnership law is controlling in our own integration analysis, which turns upon whether a particular principal is, or is likely to be, "active" or "passive" in station management. *See also Ownership Attribution*, 58 RR 2d 604, 616 (1985) ("mere fact that a limited partnership conforms to the provisions of the [Revised Uniform Limited Partnership Act] does not provide meaningful assurance that the limited partner will lack the ability to significantly influence or control partnership affairs").

18. Moreover, because *Cotton* was based, in large part, on the contradictory provisions of the specific partnership agreement before the Commission, we disagree with RET's argument that *Cotton* is inconsistent with cases cited in RET's petition that looked to the conduct of the partners and shareholders in ascertaining whether the organizational structure was *bona fide*. Although conduct is certainly a factor that may show that a structure is not *bona fide*, it appears only prudent that, in initiating an inquiry as to an applicant's integration proposal based on its business structure, the Commission commences with the underlying document governing the applicant's business structure and operational authority. If that document, for which the applicant is solely responsible, is fatally flawed, the applicant has no one other than itself to blame if it is denied integration credit. *See Payne Communications, Inc.* 1 FCC Rcd 1052, 1054-1055 (Rev. Bd. 1986)(integration credit denied where partnership agreement was flawed allowing limited partners to remove the proposed integrated general partner). [4]

19. Turning to RET's contention that the record does not support a finding that Krone has exercised *de facto* control over RET, we are of the view that these arguments previously were carefully considered and rejected in our original *Decision* (*see* 3 FCC Rcd at 3954-3955). Thus, it would be pointless here to reiterate those arguments. As noted earlier, it is well established Commission precedent that reconsideration will not be granted merely to reargue matters previously considered and resolved. *See WWIZ, Inc., supra*. However, it is appropriate to restate that RET's application has, in essence, become "passive investor" Gary Krone's application. As stated in our *Decision* (3 FCC Rcd at 3955, emphasis added):

> Whereas Krone (who is not proposed to be integrated) is alleged to possess no active role in RET's corporate affairs, Krone has exercised important *de facto* control over RET. For example, Ward and Krone were primarily responsible for drafting the terms of RET's existing limited partnership agreement. In negotiating and drafting RET's agreement, Krone exercised significant power over the business and affairs of RET by insisting on the authority to restrict the compensation received by the general partners. Krone also determined that RET would distribute at least 25% of its profits to the four limited partners and he likewise demanded that he have the first option to make loans to RET. As result, the partnership agreement was modified accordingly. Finally, Krone demanded that Ward serve as General Manager of RET's proposed station for at least 5 years, the two entering a side agreement to this effect. Of course, the Commission has described *de facto* control as the ability to "dominate" corporate affairs. *News International, PLC* 97 FCC 2d 349, 356 (1984). Thus, in dictating the most crucial terms of RET's governing documents, Krone had already dominated RET's affairs and activities in the most vital respects. Apparently needing Krone's money to even prosecute its application (Tr. 3002), the other partners simply submitted to Krone's numerous demands. In light of Krone's dominance of RET, RET's claim that Krone is "passive" [in] its affairs is belied by the clearest empirical evidence. *Here, we agree with the ALJ that the record evidence, taken as a whole, clearly demonstrates that Krone has, and would, exercise dominion and control over RET.* Thus, for the reasons enunciated hereinabove, RET is not entitled to receive any integration credit.

20. Finally, we comment on RET's contention (RET's Petition at nn. 1,44) that, even if Krone's interests were included in RET's integration proposal, its integration credit should be reduced only by Krone's equity interest. The difficulty with this contention is that RET's business structure is designed to wholly separate the voting structure from the principals' capital contributions and equity ownership. The latter, however, are obviously in a state of flux, as reflected in RET's amendment filed July 18, 1988 reporting an increase in the capital contributions of its general principals and a decrease in their equity interests. Thus, for example, NTC argues that RET would be entitled to no more than 16% integration credit, a figure which represents the extent of the capital contributions of RET's general partners at the time of hearing. Rather than to engage in "abstract legal inter-play and the gamesmanship of advocacy," *Independent Masters, Ltd.*, 104 FCC 2d 178, 185 (Rev. Bd. 1986), we are of the view that RET's proposal is too nebulous to permit reasonable comparison with NTC's unconditional integration proposal. [5]

21. ACCORDINGLY, IT IS ORDERED, That the unopposed Petition for Leave to Amend filed July 18, 1988 (and a Supplement thereto) by Reno- Eleven Telecasters is GRANTED, and the amendment ACCEPTED; and,

22. IT IS FURTHER ORDERED, That the Petitions for Reconsideration filed July 20, 1988 by Reno-Eleven Telecasters and Reno Minority Broadcasting Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] *Technical Note 101, "Transmission Loss Predictions For Tropospheric Communications Circuits,"* by P. L. Rice, A.G.Langley, K.A. Norton and A.P.Borisi, published by the U.S. Department of Commerce, National Bureau of Standards (revised January 1, 1967).

[2] NTC also demonstrates that an evaluation of RMBC's actual signal strength predictions indicates that RMBC's computations are flawed. In the case of the 336.2^0 radial toward Litchfield, California, for example, NTC's engineering consultant computed the predicted signal level using the "Tech Note 101" methodology to be 56.7 dBu instead of 34.7 dBu as predicted by RMBC, a 22 dB difference (NTC Eng. St. at 5). Even relying on RMBC's "Tech Note 101" methodology, a stronger than grade B (56 dBU) signal is provided at the 336.2^0 radial. Thus, NTC claims that "this flaw again illustrates the unreliable nature of RMBC's supplemental engineering statement."

[3] One additional matter should be clarified. At para. 11 of the *Decision*, (3 FCC Rcd at 3950) it is correctly noted that counsel for RCBC admitted that RCBC did not want to expend additional funds for a full "Tech Note 101" study. However, at para. 12 (3 FCC Rcd at 3951) it is stated that neither RCBC nor RMBC opted for expending more money for the study. RMBC apparently did not make that claim, and in its petition (at fn. 4) it states that it would "expend whatever resources are necessary to determine accurate coverage figures."

[4] RET also argues that our denial of integration credit based on the dual nature of its general partners is internally inconsistent with our crediting NTC's integration proposal where four of NTC's voting stockholders owned both voting and non-voting stock. RET relies on *Mark L. Wodlinger*, 3 FCC Rcd 3139, 3145 n. 4 (Rev. Bd. 1988), where, RET argues, the Board held that there was no principled basis for differing treatment of non-voting shareholder (as opposed to limited partnership) attorney- principals. RET contends that if *Cotton* is good law, it must be applied to deny integration credit for dual ownership for all types of active and passive interests. We do not agree with RET that *Cotton* (read in light of *Wodlinger)* dictates denial of NTC's credit. In *Wodlinger*, the Board noted that the Commission's *Clarification on Ownership Attribution*, 1 FCC Rcd 803, 804 (1986), mandates that the "equity interest" of limited partners who provide legal representation and counsel to the partnership is attributable "for comparative purposes to the applicant." 3 FCC Rcd at 3141. Further, "a partner whose contribution to the partnership is in the form of personal services and expertise rather than in the form of a financial investment is the *antithesis* of a passive investor." Id. (quoting from 1 FCC Rcd at 804). Reasoning that attorneys, who provide similar counsel to applicants, but hold their equity interests in the form of non-voting stock rather than as a limited partner, should be treated in a similar fashion, we stated that unless and until further Commission guidance was available, the Board would treat uniformly the ownership interests of attorneys who perform legal services for an applicant. 3 FCC Rcd at 3145.

[5] RET has also filed a novel "Request for Oral Argument" on the issues raised in its petition. Section 1.277 of the Commission's Rules, 47 CFR §1.277, governs oral arguments and limits such to exceptions to an Initial Decision. Further, the granting of oral argument is discretionary. 47 CFR §1.277(c). In light of our disposition on the merits of RET's petition, it is clear that oral argument would not, in any event, be useful. And, it has long been settled that it is not the Board's practice to hold oral argument with respect to interlocutory matters "except in the most unusual circumstances." *Ottawa Broadcasting Corp.*, 3 RR 2d 575 (Rev. Bd. 1964).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-442

In re Applications of

MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT (hereafter District)	File No. BPED-860624MC
SUN HEALTH CORPORATION (hereafter Sun)	File No. BPED-870626MB
ARIZONA BOARD OF REGENTS FOR ARIZONA STATE UNIVERSITY (hereafter ASU)	File No. BPED-870626MC
WESTERN BROADCASTING CORPORATION (hereafter Western)	File No. BPED-870629MA
RADIO ALLIANCE PHOENIX (hereafter Alliance)	File No. BPED-870629NO

For Construction Permit for a New Noncommercial Educational Broadcast Station in Phoenix, Arizona Channel 208A (89.5 MHz)

HEARING DESIGNATION ORDER

Adopted: August 25, 1988; Released: September 22, 1988

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has under consideration the above-captioned mutually exclusive applications.

PRELIMINARY MATTER

2. District proposes to collocate its transmitting antenna with co-owned noncommercial educational station KJZZ at South Mountain Park near Phoenix, and to operate with an effective radiated power (ERP) of 0.091 kilowatts at an antenna height above average terrain of 446 meters. Alliance states that it will sidemount its antenna on the existing KTVW-TV/ KNXV-TV tower on South Mountain, proposing an ERP of 0.0759 kilowatts and an HAAT of 502.9 meters. ASU petitioned to deny both applications, alleging that neither could construct at the South Mountain site and comply with both the U.S./Mexican Treaty and the minimum power requirements for noncommercial FM stations. *Petition to Deny*, at paragraph 4 (District) and at paragraphs 4 & 6 (Alliance). ASU claims 47 C.F.R. § 73.511 prohibits new noncommercial educational stations with an ERP less than 0.1 kilowatts (100 watts). However, since the filing of ASU's petitions, the Commission has modified its rules to permit any Class A station to have an ERP less than 100 watts, provided that the resulting reference distance equals or exceeds 6 kilometers. *Memorandum Opinion and Order* in MM Docket No. 86-144, 3 FCC Rcd 2477, 2478 (1988). This modification became effective with publication in the May 13, 1988 *Federal Register*, applicable to all applications pending or received on or after September 25, 1987. Accordingly, ASU's petitions will be denied.

DISTRICT

3. 47 C.F.R. § 73.1125 requires FM broadcast licensees to maintain a main studio within the station's principal community (3.16 mV/m) contour. District proposes to collocate its studio with KJZZ in Mesa, Arizona, outside its predicted 3.16 mV/m contour. In support of its request, District states that "the proposed studio location will be on the campus of Mesa Community College, a facility which is part of the Maricopa Community College District." Further, District notes that "[t]he studio location is easily accessible by freeway from Phoenix" and that collocation with KJZZ would enable District to "make use of existing staff and facilities to provide a higher level of service to Phoenix." *Engineering Statement*, at page 5. The location of a readily accessible main studio is seen to be an integral means by which the Commission assures service to a community of license. *See FM - TV Main Studio Moves*, 27 FCC 2d 851, 852 (1971). Since District has not indicated the lack of suitable studio locations anywhere within its principal community contour, its request for waiver of 47 C.F.R. § 73.1125 does not rise to the level necessary to justify waiver. Accordingly, an issue shall be specified.

4. On March 18, 1988, District petitioned for leave to amend its application. The accompanying amendment was filed after March 11, 1988, the last date for filing minor amendments as of right in this proceeding. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from this amendment will be disallowed.

ASU

5. On March 11, 1988, the last date for filing *minor* amendments as of right in this proceeding, ASU amended its application to change frequency (from 89.5 to 89.1 MHz), transmitter location and ERP (from 265 watts to 50.6 kilowatts). As it noted in Section V-B, Item 11 of its amended application, these changes would result in an increase in gain area of 1698% over that predicted in its tendered application. These changes, ASU argues, are

made possible by the rule amendments adopted by the Commission in its *Report and Order* in MM Docket No. 87-140, 2 FCC Rcd 6754 (1987), which permitted noncommercial educational FM applicants within 320 kilometers of the U.S./Mexican border to base their spacings to domestic noncommercial educational FM stations on the contour method (provided they observe required mileages to Mexican assignments) rather than on the distance separation table prescribed in 47 C.F.R. § 73.207(b)(3).

6. ASU has requested that the Commission waive the provisions of 47 C.F.R. §§ 73.3522(a)(2) and 73.3573(a)(1) to permit *minor* treatment of its admittedly *major* amendment and to receive full comparative advantage for its allegedly "superior engineering proposal."[1] In support of its request, ASU argues that its amended proposal would result in a dramatic increase in service over its tendered proposal, estimating that an additional 500,000 persons, "many in rural areas, would benefit from the additional service which could be provided on 89.1 MHz as compared to the present 89.5 MHz proposal." *Amendment and Request For Waiver*, at page 3. ASU further claims that all the Phoenix applicants "had the same notice of the Commission's consideration of these rule changes, and all applicants had the same opportunity to study the effect of the proposed rules." *Id.*, at page 4. Finally, ASU argues that acceptance of its amendment "would be consistent with Commission policies permitting commercial FM station licensees and permittees to upgrade their facilities by requesting adjacent channel allotments and authorizing modifications without exposure to competing applications. *Report and Order* in MM Docket 85-313." *Id.*, at page 3. On April 25, 1988, District petitioned to deny ASU's amendment, stating that "[i]t would be a strange and prejudicial result indeed if ASU were rewarded for its gamesmanship in attempting to sidestep the major amendment rule while [District] was prejudiced by its adherence to the rule." *Petition*, at page 4.

7. ASU's reliance on Dockets 87-140 and 85-313 is misplaced. The specific intent of the former docket was to "encourage the growth of the NCE-FM service in the border area, and make our NCE-FM assignment policy consistent throughout the United States." *Docket 87 - 140*, at 6755. However, the Commission emphatically stated in this matter that its "application procedures will remain the same for new stations and for stations requesting to upgrade existing facilities." *Id.* ASU's reliance on *Report and Order* in MM Docket 85-313, 60 RR 2d 114 (1986), is similarly misplaced since that docket specifically limited its applicability to existing and newly instituted rule making proposals. *Docket 85 - 313*, at 120. Accordingly, we find no justification for removing the established protection afforded cut-off applicants against the acceptance of untimely filed competing applications. *See, e.g., FM Channel Assignments* (*Las Vegas, NV.*), 59 RR 2d 1330 (1986). ASU's *major* amendment, therefore, is a "suicide" amendment since its acceptance would constitute a major change requiring the assignment of a new file number to its application and the resultant dismissal of its application from the instant proceeding. Consequently, ASU's amendment will be returned and the applicant given 30 days from the release of this Order to file an amendment with the presiding Administrative Law Judge that restores its proposal to its tendered status, or the presiding Administrative Law Judge is authorized to dismiss the ASU application. *See, e.g., St. Croix Wireless Co., A Limited Partnership*, 2 FCC Rcd 4447 (1987). Given this action, District's petition will be dismissed as moot.

OTHER MATTERS

8. District, ASU and Alliance all propose to sidemount their antennas on existing towers that currently support FCC-licensed antenna systems. Our engineering study indicates that the combined operation of the existing station and each of the proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that these applicants may have failed to comply with the newly revised environmental criteria set forth in the Report and Order in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since the three proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. These studies must consider the cumulative effect of the proposed operations and all nearby RF sources. Accordingly, District, ASU and Alliance will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

9. ASU has indicated that it will collocate its antenna on an existing tower owned by the University. According to the Commission's data base, the overall height above ground level (OHAGL) is 22.9 meters and the overall height above mean sea level (OHAMSL) 672.1 meters. ASU, however, lists the OHAGL as 15.2 meters and the OHAMSL as 670 meters. Western indicated that it will locate its transmitting antenna on an existing tower previously used by KPHO-TV and KJJJ-FM (now KKFR). According to the Commission's data base, the OHAGL is 140.2 meters and the OHAMSL 470.9 meters. Western has listed the OHAGL as 140.8 meters and the OHAMSL as 471.5 meters, a discrepancy of 0.6 meter. Since both ASU and Western propose to locate on existing towers previously authorized by the Commission and since specific reference is made to the towers in various places of their respective applications, the staff could, drawing on the application as a whole, confidently verify the transmitter locations by taking official notice of the site coordinates and tower heights as found in the Commission files. Accordingly, the ASU and Western applications were found

acceptable for filing. However, both shall be required to file corrective amendments with the presiding Administrative Law Judge within 30 days of the release of this Order.

10. Section II, Item 4(a) of FCC Form 340 (May 1985) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Neither Sun nor Alliance have completed Item 4 correctly, listing post office boxes for Paul Tatz and W.A. Turner (Sun) and for Terrance Booth, Sr. (Alliance). Accordingly, Sun and Alliance will be required to submit an amendment which gives all the information required by Section II, Item 4.

11. None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed Reg. 49560 (1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement themselves.

12. Inasmuch as this proceeding involves competing applicants for noncommercial educational facilities, the areas and populations aspect of the standard comparative issue will be modified in accordance with the Commission's prior action in *NewYork University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

13. Except as indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding, on the issues specified below.

14. Accordingly, IT IS ORDERED, That pursuant to 47 U.S.C. § 309, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, pursuant to Section 73.1125, whether good cause exists for District's proposed location of its main studio outside its principal city (3.16 mV/m) contour.

2. If a final environmental impact statement is issued with respect to District, ASU and/or Alliance in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the petitions filed by ASU to deny the applications of District and Alliance ARE DENIED.

16. IT IS FURTHER ORDERED, That the petition for leave to amend filed by District IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That the amendment filed March 11, 1988 by ASU IS RETURNED, and that the associated petition filed by District to deny acceptance of ASU's amendment IS DISMISSED AS MOOT.

18. IT IS FURTHER ORDERED, That in accordance with paragraph 8 hereinabove, District, ASU and Alliance shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

19. IT IS FURTHER ORDERED, That in accordance with paragraph 9 hereinabove, ASU and Western shall file amendments correcting the discrepancies in their tower heights.

20. IT IS FURTHER ORDERED, That Sun and Alliance shall submit amendments containing the information required by Section II, Item 4 of FCC Form 340, to the presiding Administrative Law Judge within 30 days after the release of this Order.

21. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, shall give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] 47 C.F.R. § 73.3573(a)(1) states, in pertinent part, that a major change for noncommercial educational FM applicants "is any change in frequency or community of license or any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50% or more in the area within the station's predicted 1 mV/m field strength contour."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-446

In re Applications of

WILLIAM H. ZELIFF, JR. (hereafter Zeliff)	File No. BPH-871029MA
WALTER B. PREBLE III & DANIEL R. GUY A PARTNERSHIP (hereafter Preble-Guy)	File No. BPH-871029MC
DOUGLAS KENT POOR (hereafter Poor)	File No. BPH-871029MF
GLADYS E. POWELL (hereafter Powell)	File No. BPH-871029MI

For a Construction Permit for a New FM Station on Channel 258A in Jackson, New Hampshire

HEARING DESIGNATION ORDER

Adopted: August 26, 1988; Released: September 22, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Zeliff.* Mr. William H. Zeliff, Jr. is a 20% nonattributable Limited Partner in Mt. Washington Valley Broadcasting, Limited Partners, an applicant for a new FM construction permit at Conway, New Hampshire (File No. BPH-870909ME). The applicant has indicated that he will divest his interest and sever all connection with Mt. Washington Valley Broadcasting, Limited Partners, in the event a construction permit is awarded to his Jackson application as a result of this proceeding. Accordingly, an appropriate condition will be ordered.

3. *Powell.* Ms. Gladys E. Powell is currently the General Manager at FM broadcast station WMOU(FM) at Berlin, New Hampshire. The applicant has indicated that she will resign from her current position with radio station WMOU(FM) in the event a construction permit is awarded to her Jackson application as a result of this proceeding. Accordingly, an appropriate condition will be ordered.

4. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
Powell	January 15, 1988

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That in the event of a grant of Zeliff's application, William H. Zeliff, Jr. shall divest his interest in and sever all connections with Mt. Washington Valley Broadcasting, prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That in the event of a grant of Powell's application, Gladys E. Powell shall resign her position at radio station WMOU(FM) prior to the commencement of program test authority.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Powell IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with

the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-443

In re Applications of

UNITED COMMUNITY ENTERPRISES, INC. (hereafter United)	File No. BPH-871106MA
RADIO GREENWOOD, PARTNERSHIP (hereafter Radio)	File No. BPH-871109MK

For Construction Permit for a New FM Station on Channel 278A in Greenwood, South Carolina

HEARING DESIGNATION ORDER

Adopted: August 26, 1988; Released: September 22, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. United is the licensee of station WMTY-AM in Greenwood, South Carolina, and it has indicated that in the event a construction permit is issued in this proceeding it will divest of any interest in this station under one of the following conditions: (i) If the Commission awards United a preference as the operator of a daytime-only AM station, it will divest itself of any interest in station WMTY-AM within three (3) years following the grant of the instant application, or as directed by the Commission under its daytime-only preference policy; or, (ii) if the Commission does not award United a daytime-only preference, United will divest WMTY-AM prior to the commencement of operation of the FM station. Additionally, United principal Wallace A. Mullinax, Sr., is an officer and director of Broadcasting Company of the Carolinas, the corporate licensee of stations WESC(AM) and (FM), Greenville, South Carolina. He has promised to divest himself of this interest prior to commencement of the operation of the proposed FM station. Accordingly, appropriate conditions will be specified below.

3. From our engineering study of the applications of United Radio, it is concluded that both applicants must submit a detailed study based upon OST Bulletin No. 65, October, 1985, entitled "Evaluating Compliance with FCC Specified Guidelines for Human Exposure to Radio Frequency Radiation." This study has to include the effects of co-located AM station WMTY for United and colocated AM station WQXJ for Radio. In this regard, if a fence is already built that complies with the guidelines, the applicants must so state and give the distance from the base of their towers to the fence. Accordingly, the applicants are required to amend their applications within 30 days of the date of this order to demonstrate compliance with the RF radiation guidelines. The cumulative effect of the proposed operation and all nearby RF sources must be considered. Since the proposals of the applicants may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicants are required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, the applicants will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to the United and Radio in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.130-1319 of the Commission's Rules.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in the event United is not awarded a daytime-only preference and a construction permit is issued in this proceeding to United, prior to commencing program test authority, the applicant will dispose of its interest in station WMTY(AM), Greenwood, South Carolina; That, in the event a daytime-only AM station preference policy is involved, United will divest of such interest within three years, or as directed by

the Commission; and That Wallace A. Mullinax, Sr. shall divest himself of any interest in stations WESC(AM) and (FM), Greenville, South Carolina.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, United and Radio shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHERED ORDERED, That, the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, shall give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-444

In re Applications of

LAKESIDE BROADCASTING, INC. (hereafter Lakeside)	File No. BPH-870910MH
HANSON R. CARTER (hereafter Carter)	File No. BPH-870910NV
WILLIE FRANK CALHOUN (hereafter Calhoun)	File No. BPH-870910OC

For a Construction Permit for a New FM Station on Channel 290A in Lakeland, Georgia

HEARING DESIGNATION ORDER

Adopted: August 26, 1988; Released: September 22, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Calhoun*. Calhoun is unable to certify that he has sufficient net liquid assets on hand or that sufficient funds are available from committed sources to construct and operate his proposed facility for three months without revenue. Accordingly, an issue will be specified to determine whether he is financially qualified.

3. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after December 4, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT
Lakeside	March 22, 1988; May 23 1988; June 10, 1988

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Calhoun would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended the applicants ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Calhoun, whether the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Calhoun.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein. *APPLICANT* : Lakeside

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20054.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act 10 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within

the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-445

In re Applications of

BROCK BROADCASTING COMPANY (hereafter Brock) — File No. BPH-870922MI

MARGATE COMMUNICATIONS LIMITED PARTNERSHIP CLEO BROOKS, GENERAL PARTNER (hereafter Limited) — File No. BPH-870922MT

COASTAL COMMUNICATIONS LIMITED PARTNERSHIP (hereafter Coastal) — File No. BPH-870922ME (PREVIOUSLY DISMISSED)

For Construction Permit for a
New FM Station in Margate City, New Jersey
Channel 241A (96.1 MHz)

HEARING DESIGNATION ORDER

Adopted: August 26, 1988; Released: September 22, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* On May 25, 1988, Coastal petitioned for reconsideration of the FM Branch's return of its application as unacceptable for filing. Specifically, the Branch denied Coastal's request for waiver of 47 C.F.R. § 73.207 to permit a 1.4 kilometer short-spacing to co-channel Class B FM station WLEV in Easton, Pennsylvania. In its action, the Branch noted that "Commission policy does not permit waiver of the minimum mileage separation requirements absent a showing that no fully-spaced (or lesser short-spaced) site exists" and that two other applicants for the Margate City allotment "have indicated that fully-spaced sites exist, and no issue has been raised against their availability or technical feasibility." *Letter to Coastal Communications Limited Partnership from Dennis Williams, Chief, FM Branch,* (dated April 19, 1988).

3. In its petition for reconsideration of this action, Coastal argues that it "has been set up" since it was unable procedurally to raise site availability issues against Brock and Limited because the Commission does not permit applicants to file petitions which essentially seek the designation of issues. *Petition,* at paragraphs 1 and 4. Counsel for Coastal alleges that his telephone conversations with the persons listed in the Brock and Limited applications as having provided assurances of site availability reveals that neither applicant has reasonable assurance of the availability of their respective sites. Specifically, Coastal's counsel claims that his phone conversation with William Ward indicated that Mr. Ward had not spoken to any person representing Brock about the use of Shooting Island as a tower site. With respect to Limited's proposed antenna site atop the Port-O-Call in Ocean City New Jersey, Coastal's counsel claims his phone conversation with Scott Emack of that hotel revealed that Carlos Jarrin, the person listed in Limited's application as giving assurance of the availability of the site, "was no loner [sic] with the company" and that "the company had determined that it did not desire to have any antennas atop the hotel." In opposition, Limited states that Mr. Jarrin "is still an employee of the company" and that Limited "received a confirmation from Mr. Jarrin of the originally specified site." *Opposition,* at page 4.

4. "Where no substantial and material question of fact regarding technical feasibility or availability is raised concerning *all* other applicants' fully-spaced transmitter sites, a short-spaced application will not be designated for hearing with a short-spacing issue against it" (emphasis added). *Donovan Burke,* 104 FCC 843, 846 (1986). These questions may be raised at the outset in the applicant's waiver request or upon reconsideration *See, e.g., Clearlake Broadcasting Company,* 47 Fed. Reg. 47931 (1982). Coastal's waiver request did not raise such questions, merely claiming generally that "no suitable nonshort-spaced [sic] site is available due to other applications improper [sic] under rules." *Coastal Application,* at Exhibit 13. Upon reconsideration, however, Coastal has provided documentation that effectively raises a significant question of fact about Brock's claim of reasonable assurance of site availability. Specifically, in its June 16, 1988 supplement to its reconsideration, Coastal provides a letter from the State of New Jersey's Bureau of Real Property Management indicating that William Ward has "absolutely no recollection of giving such assurance to anyone associated with [Brock]" and that he has "no idea where [Brock's proposed site] Shooting Island is nor [does he] know any of the people listed as principals of this firm." Accordingly, an appropriate site availability issue *and* a contingent misrepresentation issue shall be specified against Brock.

5. Lacking similar documentation, however, in support of its allegation concerning Limited's site availability assurance, the sworn affidavit of Coastal's counsel is rendered unpersuasive. Since Coastal's burden was to raise a substantial and material question of fact concerning *all* fully-spaced sites in this proceeding, its petition must therefore be denied.

6. *Brock.* Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. Although Brock certified in Section VII of its application that it had or would comply with this requirement, an examination of the actual notice provided in its February 29, 1988 amendment reveals that Coastal's effective radiated power was listed incorrectly, its

antenna height omitted, and its organizational structure incorrectly described as a general partnership. Accordingly, Brock will be required to republish its local notice and provide evidence that such republication complies with the provisions of § 73.3580 to the presiding Administrative Law Judge within 30 days of the release of this notice.

7. Brock lists its height above average terrain (HAAT) as 101 meters horizontal and 100 meters vertical in Section V-B, Item 7(b)(3). The average, however, of the eight radials listed in Section V-B, Item 19 is 100 meters, the identical figure listed in the engineering statement, antenna sketch, site and contour maps. Furthermore, since the horizontal radiation center above ground (RCAGL) is equal to the vertical RCAGL and the horizontal radiation center above mean sea level (RCAMSL) is equal to the vertical RCAMSL, the horizontal HAAT should equal the vertical HAAT. Therefore, drawing on the application as a whole, the staff can confidently and reliably determine that the correct HAAT is 100 meters horizontal and 100 meters vertical. Accordingly, Brock's application was found to be acceptable for filing. However, Brock will be required to file a corrective amendment to its application with the presiding Administrative Law Judge within 30 days of the release of this Order.

8. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Brock have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Brock would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. The Commission requires that if there will be five or more fulltime employees, the applicant must complete and file Section VI of FCC Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Although Brock filed such a statement, it is deficient since it fails to list any clearly defined female and minority organizations it proposes to use to encourage the referral of qualified minority and female job applicants. Accordingly, Brock will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

10. *Limited*. Limited proposes to mount its antenna on a pole atop the Port-O-Call Hotel, but its application does not list the proposed antenna radiation center above the rooftop. Without knowledge of this height, it is not possible for the Commission staff to properly consider compliance of § 1.1307(b). Therefore, Limited will be required to amend its application to demonstrate compliance with the RF radiation guidelines. All calculations should be made at the rooftop and level and consider possible human access to the rooftop. Since Limited's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Limited will be required to file, within 30 days of the release of this Order, an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

11. *Other Matters*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. (a) To determine whether Brock has reasonable assurance that the transmitter site specified will be available to it; (b) to determine, in light of the facts and circumstances adduced pursuant to (a) above, whether Brock misrepresented facts to or concealed information from the Commission; and (c) To determine, in light of the facts adduced pursuant to the foregoing issues, whether Brock possesses the basic qualifications to be the licensee of the facilities sought here.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Brock would constitute a hazard to air navigation.

3. If a final environmental impact statement is issued with respect to Limited in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Coastal IS DENIED.

15. IT IS FURTHER ORDERED, That Brock shall republish its local notice and provide evidence of this fact to the presiding Administrative Law Judge within thirty days of the release of this Order.

16. IT IS FURTHER ORDERED, That Brock shall file an amendment correcting the discrepancy in its antenna height above average terrain as described in paragraph 7 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That, within thirty days of the release of this Order, Brock shall submit an amendment of its model EEO program in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

19. IT IS FURTHER ORDERED, That in accordance with paragraph 10 hereinabove, Limited shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

20. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NATIONAL INNOVATIVE PROGRAMMING NETWORK, INC., OF THE EAST COAST — File No. BPTTL-810112LE

For a Construction Permit for a
New Low Power Television Station on Channel 19,
New York, New York

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1988; Released: September 22, 1988

By the Commission:

1. The Commission has under consideration a Petition for Reconsideration filed October 22, 1987, by Poseidon Productions, Inc. (Poseidon), of our Memorandum Opinion and Order, 2 FCC Rcd 5641 (1987), in the above-styled proceeding. Opposition to Poseidon's petition was filed on November 2, 1987, by National Innovative Programming Network, Inc., of the East Coast (National). Subsequently, on December 8, 1987, Poseidon filed a Supplement to its petition, which National opposed on December 18.

2. In the above-mentioned Memorandum Opinion and Order, the Commission denied Poseidon's application for review of the action of the Chief of the Video Services Division, Mass Media Bureau, taken pursuant to delegated authority on December 19, 1986. Therein, the Bureau had rejected arguments that National, in its amended application for a construction permit for a new low power television station on Channel 19, New York, New York, lacked reasonable assurance of the availability of its proposed antenna site and that National's inclusion of faulty antenna height above average terrain (HAAT) data required dismissal of that application.[1] The facts in this case were set out in our Memorandum Opinion and Order, and we see no reason for recapitulation at this juncture.

3. For the most part, Poseidon's petition simply repeats allegations that it has previously presented and that the Commission has already considered and rejected.[2] Poseidon does, however, advance one new piece of evidence in its petition for reconsideration; it submits, for the first time, a statement from Mr. Donald Barnett, former manager of Fordham University's radio station WFUV-FM, on whose tower National claims to have been given a reasonable assurance of an antenna site.[3] Mr. Barnett had been the party alleged by National to have spoken with its consulting engineer concerning use of the WFUV-FM tower by the proposed low power television station. *See* 2 FCC Rcd at 5642. The Commission decided that these communications, along with subsequent statements by Fordham's Presidents, *id.* at 5641, indicated not only that National in fact did have reasonable expectation of an antenna site at the time it filed its amended application, but also that it continued to have such an expectation up through the present time. *Id.* at 5643. In the newly submitted statement, Mr. Barnett states:

> To the best of my recollection, sometime in 1982 I was contacted by an individual on behalf of an applicant for a low power facility in New York concerning the use of the Fordham Tower for the low power applicant's proposed antenna site. I don't recall the name of the person that contacted me, but I do recall explaining to the person that I do not have the authority to give permission but I would discuss it with my superior.
>
> I discussed the matter as I recall with Dean Joseph J. McGowan of Fordham University . . . .As a result of this discussion, Dean McGowan advised me that the University would not be interested in entering into any arrangement for lease of the WFUV tower. I so advised the individual who had contacted me and I heard nothing further.

According to Poseidon, the above declaration contradicts statements made by Mr. George Jacobs and Mr. J. Bruce Paschal regarding National's communications with Mr. Barnett. Consequently, argues Poseidon, the declaration casts strong doubt on National's contention that it was ever given permission to use the Fordham site, and, therefore, National's application should be dismissed or designated for hearing.

4. We are not persuaded that Mr. Barnett's new statement warrants any change in our previous decision in this matter. First, in cases in which the Commission has already denied an application for review, a petition for reconsideration will be entertained only if it relies upon new circumstances or newly learned facts. The new circumstances can have arisen only after petitioner's last opportunity to present its case; the newly learned facts can be only those which, through the exercise of ordinary diligence, could not have been learned until after such opportunity, and their consideration must be determined to be in the public interest. Section 1.115(g) of the Commission's Rules. *See generally, e.g., Southeast Arkansas Radio, Inc.*, 61 FCC 2d 72 (1976). With regard to Mr. Barnett's recently submitted statement, Poseidon contends: "The declaration was only recently obtained from Mr. Barnett and has been promptly filed. Thus, good cause exists for consideration of the instant supplement." We disagree. Poseidon has made no showing that the information provided in Mr. Barnett's statement could not have been obtained before its last opportunity to present its case.

5. Moreover, even if it could conceiveably have been obtained only after Poseidon's last opportunity to present its case, Mr. Barnett's declaration is utterly lacking in specific allegations of fact and is insufficient to show that a grant of National's low power television application would be *prima facie* inconsistent with the public interest, convenience and necessity. 47 U.S.C. Section 309(d)(1). National is correct in stating that the declaration adds nothing to the facts concerning the relevant issue regarding reasonable assurance of an antenna site. Void of specifics, the declaration does not contradict the sworn statements offered by Mr. Jacobs and Mr. Paschal. Mr.

Barnett does not challenge, in any way, Mr. Jacobs' recount of his discussions with him regarding National's possible use of the Fordham antenna site, including the *verbatim* reading of National's September 21, 1982, amendment. Conversely, it is not at all apparent that the person with whom Mr. Barnett had spoken was either of these two individuals. While Mr. Paschal maintains that he contacted Fordham University in August 1982 and Mr. Jacobs states that he contacted Mr. Barnett in August 1982 and on September 16 of that same year, Mr. Barnett does not allege any date other than "sometime in 1982," and he does not claim that the party with whom he had spoken represented National. (I was contacted *by an individual* on behalf of *an applicant* . . . .) At best, Mr. Barnett's statement upholds Dean McGowan's statement submitted by Poseidon earlier in these proceedings to the effect that, as least as far as Dean McGowan was concerned in May of 1985, the University had no intention of sharing its tower space with a low power television facility. Dean McGowan's statement, however, is at variance with the decisions of his superiors, two consecutive Presidents of Fordham University. One of those two Presidents, James C. Finlay, had expressed his acceptance of National's proposed use of the Fordham site eleven months before Dean McGowan stated his opinion. Thus, whatever Dean McGowan's position was, it appears that the applicant had reasonable assurance of the availability of the Fordham antenna site. In conclusion, on the basis of the application and pleadings, the view that we expressed in the Memorandum Opinion and Order released on September 22, 1987, has not changed: no substantial or material question of fact has been presented.

6. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Poseidon Productions, Inc., IS DENIED.

7. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this Memorandum Opinion and Order by Certified Mail--Return Receipt Requested to the parties named herein.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] National had been chosen as the tentative selectee of the construction permit in lottery group L85-488 on April 29, 1985. National had tendered its original application to the Commission on January 12, 1981, proposing the Empire State Building as its antenna site. It amended its application on September 21, 1982, specifying its transmitting antennasite to be on a tower owned by Fordham University (Fordham), licensee of radio station WFUV-FM, in the Bronx, New York City. Poseidon's application for Channel 19, Astoria, New York (File No. BPTTL-810116ME) had been the only competing application in the lottery.

[2] Poseidon again refers to a statement by Joseph J. McGowan, Fordham's Dean of Students and Vice President for Student Affairs, denying having had any contacts with National regarding the site. Poseidon also argues that statements by National's consulting engineer and former counsel with regard to communications with Fordham University are uncorroborated and that the Commission erred in relying upon them. Additionally, Poseidon maintains that the Commission erred in refusing to dismiss National's application because of a discrepancy in its data for height above average terrain (HAAT) in its amended application. In the Memorandum Opinion and Order, the Commission agreed with the Bureau's conclusion that the statements by Mr. George Jacobs (National's consulting engineer) and Mr. R. Bruce Paschal (National's former legal counsel), together with statements by two Presidents of Fordham University, showed that Dean McGowan's conclusions were erroneous. The Commission also agreed with the Bureau's conclusion that, since HAAT data in an application are not essential, discrepancies in HAAT are not fatal pursuant to the Commission's "complete and sufficient" standard for low power television applications. These allegations, therefore, raise no new arguments and provide no new information to justify their reconsideration herein.

[3] In its Opposition to Poseidon's Supplement, National maintains that Poseidon violated the requirements of Section 1.106(f) of the Commission's Rules, because it filed its Supplement more than thirty days after the date of public notice of the final Commission action, without first requesting leave to file, giving the grounds therefor. While it appears that National is correct in this regard, we shall nevertheless consider the Supplement in order to give all parties a full opportunity to present their arguments herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CENTRAL FLORIDA EDUCATIONAL TELEVISION, INC. (WLCB-TV)
Leesburg, Florida — File No. BMPET-870717KH

GOOD LIFE BROADCASTING, INC. (WTGL-TV)
Cocoa, Florida — File No. BPCT-870811KF

For Construction Permits for Changes in Television Facilities

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1988; Released: September 22, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it for consideration: (a) the above-captioned applications of Central Florida Educational Television, Inc. (Central) for a minor change in the facilities of noncommercial educational television Station WLCB-TV, Channel 45, Leesburg, Florida, and Good Life Broadcasting, Inc. (Good Life) for a minor change in the facilities of commercial television Station WTGL-TV, Channel 52, Cocoa, Florida; (b) informal objections to Good Life's proposal, filed by the Association of Maximum Service Telecasters, Inc. (MST) and Central; and (c) related pleadings.

2. At their present sites, the stations comply with all spacing requirements. Good Life's proposed site, however, is 88.6 km from Central's authorized site, whereas Section 73.610 of the Commission's Rules requires a minimum separation of 95.7 km for UHF television stations operating on channels seven channels apart. As a result, Good Life's proposed site would be 7.1 km short-spaced. Additionally, its proposed site is 20.8 km short-spaced to Central's proposed site. Consequently, Good Life requests a waiver of Section 73.610.

3. In support of its waiver request, Good Life argues that the tower it proposes to utilize is an existing structure located in the immediate vicinity of several other towers of similar height and that the tower is therefore located in an "antenna farm". Although Good Life states that it might be able to increase the height of its present tower, it indicates that such an addition might have a significant aeronautical impact. It further contends that operation from the proposed site would create a Grade B gain area of 3,230 square miles encompassing nearly 500,000 persons and a corresponding loss area of only 362 square miles and 20,000 persons. Finally, it maintains that the only interference that would result from the short-spacing would be to reception of the Channel 52 signal. In opposition, MST and Central both argue that Good Life has failed to make the requisite showing to warrant grant of its waiver request, including a demonstration as to the unavailability of adequately spaced sites and public interest factors supporting the move. Additionally, Central contends that the Commission has not designated Good Life's proposed site as an "antenna farm" and that there are, in fact, only two towers located there. Central further argues that grant of Good Life's application would leave only two off-the-air television signals in the station's proposed loss area, whereas there are already at least five television signals in the proposed gain area.

4. Section 73.3572(e) of the Rules provides that, where television applications are mutually exclusive because the proposed transmitter sites are short-spaced to each other and where the second-filed application has been accepted for filing before the first-filed is reached for processing, both applications will be consolidated and designated for hearing. That rule, however, is applicable only to the situation where two pending applications meet all spacing requirements as to existing authorizations and reference points, but are short-spaced to each other. In other words, Good Life is entitled to comparative consideration with Central under Section 73.3572(e) only if it is in compliance with all other Commission spacing requirements. *Carolina Broadcasting Co.*, 18 F.C.C. 2d 482 (1969). Since Good Life's proposed site is also short-spaced to Central's existing site, it does not meet this test. Accordingly, Good Life must first show that waiver of Section 73.610 is warranted with respect to that short-spacing before its application can be designated for hearing with Central's proposal, and we turn to a consideration of its waiver request.

5. When an applicant requests a waiver of the Commission's minimum spacing requirements in order to improve its facilities by moving from a fully spaced site to one that is short-spaced, the Commission generally requires it first to make a threshold showing that suitable fully spaced sites or less short-spaced sites are unavailable. *Townsend Broadcasting Corporation*, 62 F.C.C. 2d 511, 512 (1976); *Edens Broadcasting, Inc.*, 2 FCC Rcd 689, 693 (Rev. Bd. 1987). Unless an unusual combination of public interest factors are present, an applicant's failure to make such a threshold showing warrants denial of the waiver request and dismissal of the application. Here, Good Life has made no attempt to demonstrate the unavailability of fully spaced sites (including its current site) or of less short-spaced sites than that proposed, and it has not shown the presence of any special public interest factors. Consequently, we are unable to conclude that waiver of Section 73.610 is warranted.

6. Accordingly, for the reasons stated above, IT IS ORDERED, That the informal objections filed by MST and Central ARE GRANTED, Good Life's request for waiver of Section 73.610 IS DENIED, its application IS DISMISSED, and Central's application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-447

In re Applications of

TELECOMMUNICATIONS NETWORK, INC. (hereafter Telecommuncations)	BPH-860131MH
WELDEN, BREVOORT, HICKMAN, INC. (hereafter WBH)	BPH-860203MW
DEBORAH H. LANAVA (hereafter Lanava)	BPH-860203MX
CLARA CROCCO (hereafter Crocco)	BPH-860203MY
DON H. BARDEN (hereafter Barden)	BPH-860203MZ

For Construction Permit for a
New FM Station, Channel 264A, 100.7 MHz
Utica, New York

HEARING DESIGNATION ORDER

Adopted: August 26, 1988; Released: September 23, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Telecommunications.* As originally filed, Telecommunications listed the following stockholders of its corporation and percentage of interest: Adolph N. Weiss, 22.7%; Harvey N. Weiss, 18.3%; Ira Magod, 27.5%; Stephen M. Weiss, 18.3%; Morris M. Freed, .7%; and Carol Magod, 12.5%. On March 12, 1986, Telecommunications amended its application to change the percentage of ownership to the following: Adolph N. Weiss, 9.1%; Harvey N. Weiss, 10.2%, Ira Magod, 13.8%; Stephen M. Weiss, 10.2%; Morris M. Freed, .5%; and Carol Magod, 6.24%. Telecommunications also indicated in its amendment that Cede & Co. now controls 48.425% of the voting stock. The instructions to FCC Form 301 provide that:

> [w]here a corporation is a party to [an] application by virtue of its ownership or subscription to 5% or more of the voting stock of the applicant, each of the corporate stockholder's directors and "executive" officers (president, vice-president, secretary, treasurer or their equivalents) is considered a party to [the] application.

In its response to Section II, Item 5(a), Telecommunications has failed to provide the above-required information with respect to Cede & Co. Accordingly, Telecommunications will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order detailing this information.

3. Furthermore, the amount of stock held by the above-listed individuals and Cede and Co., as indicated in its March 12, 1986 amendment, is equal to 98.427% of the outstanding stock. Telecommunications will also be required to provide a clarifying amendment with respect to its remaining stock.

4. Engineering study of Telecommunications' application reveals that it may significantly exceed the radio frequency radiation guideliness set forth in 47 C.F.R. § 1.1307 despite the applicant's assertion to the contrary. Since the proposal of Telecommunications may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicant is required to submit the information delineated in 47 C.F.R. § 1.1311. Accordingly, Telecommunications will be required to file within 30 days of the release of this Order an Environmental Assessment with the presiding Administrative Law Judge.[1] In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979) *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. Telecommunications indicates in Item 7 of Section V-B of FCC Form 301 that a directional antenna is *not* being proposed. However, in Figure 1 to its application, the applicant proposes a directional antenna pattern. This error has no effect on the acceptability of Telecommunications' application, which complies with all of our technical acceptance requirements. Furthermore, we are able to confidently and reliably determine that a directional antenna is being proposed. However, Telecommunications will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the date of this Order which corrects its response to Item 7 of Section V-B, FCC Form 301.

6. *WBH.* Section II, Item 4(a), FCC Form 301 (October 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. WBH has not completed Item 4(a) correctly. The WBH application gives a Post Office Box number as the residence address of Kendall Durfey. Accordingly, WBH must submit an amendment which gives all the information required by Section II, Item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. *Other Matters.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and from Telecommunications, WBH, and Crocco have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by these applicants would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Telecommunications	5 28 86; 7 12 88
Lanava	7 14 86; 9 3 86
Crocco	4 21 86
Barden	4 30 87; 8 17 87; 8 25 87; 9 16 87; 9 25 87; 10 27 87; 12 23 87; 1 11 88; 1 14 88; 1 29 88; 2 29 88; 4 7 88; 5 27 88; 6 14 88; 7 27 88

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Telecommunications, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Telecommunicaions, WBH, and Crocco would constitute hazards to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That Telecommunications shall file an amendment with the presiding Administrative Law Judge within 30 days of the date of this Order which provides, with respect to the officers and directors of Cede & Co., the information required by Item 5(a), Section II of FCC Form 301.

13. IT IS FURTHER ORDERED, That Telecommunications shall file an amendment with the presiding Administrative Law Judge within 30 days of the date of this Order which clarifies the difference between the total amount of stock in its corporation and that held by its principals as shown in its March 12, 1986 amendment.

14. IT IS FURTHER ORDERED, That Telecommunications shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That Telecommunications file an amendment with the presiding Administrative Law Judge within 30 days of the date of this Order correcting its response to Item 7 of Section V-B of FCC Form 301.

16. IT IS FURTHER ORDERED, That WBH shall submit an amendment which contains the information required by Section II, Item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Telecommunications; Lanava; Crocco and Barden.

19. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] This study must also include calculations of exposure levels measured at the base of the tower which account for the cumulative effect of the proposed facilities in conjunction with all other broadcast facilities and construction permits sharing the proposed tower.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-461

In re Applications of

JEAN BATES (hereafter: Bates)	File No. BPH-851029MI
BRUCE W. GARY (hereafter: Gary)	File No. BPH-851029MJ
B&B BROADCASTING, INC. (hereafter: B&B)	File No. BPH-851030MS
LIMELIGHT BROADCASTING CORP. (hereafter: Limelight)	File No. BPH-851030NJ

For Construction Permit for a
New FM Station on Channel 240A in
Barstow, California

HEARING DESIGNATION ORDER

Adopted: September 1, 1988; Released: September 23, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter*. It should be noted that due to the late tenderability period opened on June 2, 1988, by applicant Limelight, various amendments filed by the competing applicants, which otherwise would have been late-filed, will be considered filed as of right, and therefore will be afforded full comparative advantage. *See Memorandum Opinion and Order*, reconsideration in Docket 84-750, 50 Fed. Reg. 43157 (1985).

3. *Limelight*. In Item 15, Section V-B, FCC Form 301 (January 1982), Limelight lists the distances to the 1 mV/m contour along the 45', 225' and 270' radials as 8.4 km, 30.7 km and 30.7 km, respectively. The actual distances are 11.5 km, 26.1 km and 26.1 km, respectively. Limelight lists the distance to the 3.16 mV/m contour along both the 225' and 270' radials as 17.1 km. The actual distance to each radial is 14.7 km. This error has no effect on the acceptability of Limelight's application, which complies in all respects with our technical acceptance requirements. However, Limelight will be required to submit a corrective amendment.

4. *EEO*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Although B&B has filed such statement, it is deficient. B&B has not listed a Hispanic-oriented organization for recruitment purposes even though U.S. labor statistics indicate that Barstow is in an area in which the available labor force is 16.6% Hispanic. Accordingly, B&B will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge. Limelight's application is unclear with respect to the need for an EEO program. On both FCC Form 301 and the Model EEO Program form, Limelight stated that it plans to hire fewer than five fulltime employees. However, it nonetheless filed an EEO Program which is deficient in that Limelight has not listed a Hispanic-oriented organization for recruitment purposes. Accordingly, Limelight will be required to file an amendment clarifying its intent with respect to the number of employees it plans to hire and, if appropriate, amending its EEO Program, or an appropriate issue will be specified by the Judge.

5. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Limelight shall submit a corrective amendment specifying the information requested in Paragraph 3 herein.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, B&B and Limelight shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the

Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-454

In re Applications of

OARA, INC. (hereafter OARA)	File No. BPH-870327MG
MARY F. WATKINS (hereafter Watkins)	File No. BPH-870331MQ
MICHAEL C. GLITSCH (hereafter Glitsch)	File No. BPH-870331NN
JOE ABERNATHY d/b/a HEARTLAND COMMUNICATIONS (hereafter Heartland)	File No. BPH-870331PO
BOSWELL BROADCASTING, INC. (hereafter BBI)	File No. BPH-870415MK

For Construction Permit for a
New FM Station on Channel 241C2 (96. 1 MHz),
Madisonville, Texas

HEARING DESIGNATION ORDER

Adopted : August 30, 1988; Released: September 23, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. On February 26, 1988, OARA filed a "petition for financial verification and documentation from all applicants" in the instant proceeding. BBI in its June 28, 1988 opposition to the petition for leave filed on June 8, 1988 by Watkins joins OARA in making this request.

3. An applicant for a new FM can now certify that it has sufficient net liquid assets on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. *See Revision of Form 301*, 50 RR 281, 282 (1981). When the Commission substituted the certification requirement for detailed documentation of financial qualifications, it provided that the staff could require applicants to submit additional information and documentation if circumstances warranted. *See Public Notice, In the Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987).

4. We have reviewed OARA's request to require all applicants in this proceeding to submit financial documentation and we find that the circumstances in this instance do not warrant such action. Accordingly, OARA's petition will be denied.

5. *Watkins*. Watkins' application as originally filed on March 31, 1987 did not contain a certification indicating that she was financially qualified but stated that the certification would be supplied as an amendment to her application. On June 8, 1988, Watkins petitioned for leave to amend her application. The accompanying amendment contained, among other changes, a certification that Watkins was now financially qualified.[2]

6. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission adopted strict rules governing acceptance of amendments to applications for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right any time prior to the expiration of the 30-day period triggered by release of the Public Notice announcing that the subject application has been accepted for tender. *See* 50 Fed. Reg. at 19941; *see also* 47 C.F.R. § 73.3522(a)(6). Once this period expires, predesignation amendments "will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514" of our rules. 47 C.F.R. § 73.3522(a)(6).

7. Watkins' 30-day period for filing amendments, as a matter of right, began May 27, 1987 and ended June 29, 1987. The June 8, 1988 amendment indicating that Watkins was financially qualified was filed after this period. Watkins attempts to make a showing of good cause in her petition by arguing that the June 8 amendment updates information contained in her application as required by 47 C.F.R. § 1.65 and that it will not burden or delay this proceeding, require the addition of any issues, prejudice any party, nor confer on her a comparative advantage.

8. We reject Watkins' attempt to invoke § 1.65 of the rules in filing her late amendment. Section 1.65 requires applicants to maintain the continuing accuracy of the information contained in their applications. This rule does not, however, require the acceptance of such amendments when, as in the instant case, they cure an acceptability or grantability defect in the underlying application and the period for filing curative amendments as of right has already lapsed. *See , e. g., Donovan Burke*, 60 RR 2d 110, 112-13 (1986). Sections 1.65 and 73.3522 are complimentary, not conflicting rules and we will not allow applicants, under the guise of a § 1.65 reporting amendment, to circumvent deadlines established for the filing of curative amendments per § 73.3522. Based on the foregoing, we find that Watkins has failed to establish good cause for acceptance of her June 8 amendment. Accordingly, the financial certification contained in Watkins' June 8 amendment will not be accepted for filing under 47 C.F.R. § 1.65 and the amendment will be returned to the extent indicated herein. [3] In addition, a financial qualifications issue will be specified below.

9. Watkins' husband, Rodger B. Watkins, is president, a director, and 80% shareholder of Pine Air, Inc. (formerly KLN, Inc.) licensee of Station KNOW(AM) (formerly KLNR(AM)), Lufkin, Texas. Watkins states in her application that her husband will divest his interest in KNOW(AM) upon grant of the instant application. Accordingly, in the event a construction permit is issued to

Watkins in this proceeding, Rodger Watkins will divest himself of his interest in KNOW(AM). Accordingly, an appropriate condition will be specified below.

10. Watkins has also indicated that her husband, Rodger B. Watkins, is president and 50.2% voting stockholder of Silent Minority Group, Inc. (SMGI), an applicant for a construction permit for a new UHF television station in Bryan, Texas. This application, BPCT-870529KL, was filed on May 29, 1987 and was designated for comparative hearing with other mutually exclusive applicants. *Hearing Designation Order*, MM Docket No. 88-290, released June 15, 1988. An engineering review of Watkins' application reveals that its predicted 1 mV/m contour will encompass the entire community of Bryan, Texas and that the Grade A contour of SMGI's application will encompass the entire community of Madisonville in violation of 47 C.F.R. § 73.3555(b)(2). Further, Commission policy states that a common interest can reasonably be presumed to exist between husband and wife and that the broadcast interests of one must be attributed to the other. *See Alexander S. Klein*, 86 FCC 2d 423, 425-27 (1981). Therefore, a question is raised concerning compliance with the Commission's "one-to-a-market" multiple ownership rule, 47 C.F.R. § 73.3555(b)(2). Watkins indicates that if either her application for Madisonville or the SMGI application is granted while the other application is still pending then either Watkins or SMGI will, if necessary and as appropriate, amend their applications to request exemption from the provisions of 47 C.F.R. § 73.3555(b) consistent with Note 4 to § 73.3555. Note 4 permits determination "on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest." However, Watkins has failed to as yet provide such a showing and, consequently, an appropriate issue will be specified below.

11. In response to Section VI, FCC Form 301, Watkins has indicated that she will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. Watkins' program is deficient because she failed to identify the school(s) or other beneficiary she will utilize in her proposed training program for minorities and women interested in entering the broadcast field. Accordingly, Watkins will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. *OARA*. A former employee of WYN/WSLI, Inc., Jackson, Mississippi, which is owned by the principals of OARA, filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging discrimination based on race. The EEOC still has this matter under consideration. Accordingly, OARA will be required to inform the presiding Administrative Law Judge of any decision reached by the EEOC regarding this complaint as soon as it is available.

13. *Heartland*. Joe Abernathy, sole owner of Heartland, is the managing general partner and 33-1/3% owner of Heart of Texas Communications, Ltd., licensee of Stations KTON-AM and KTQN-FM, Belton, Texas. Mr. Abernathy had indicated that, in the event a construction permit is issued to Heartland in this proceeding, he will divest himself of his interest in these stations. Accordingly, an appropriate condition will be specified below.

14. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
OARA	January 5, 1988
Watkins	June 30, 1987; June 8, 1988

15. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

16. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Watkins, whether the applicant's interest in the application for construction permit for a new UHF station to serve Bryan, Texas (File No. BPCT-870529KL) and the new FM station proposed here, are consistent with Section 73.3555 of the Commission's Rules and, if not, whether a grant of the application would be in the public interest.

2. To determine with respect to Watkins, whether the applicant is financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That the "petition for financial verification and documentation from all applicants" filed by OARA IS DENIED.

19. IT IS FURTHER ORDERED, That the February 8, 1988 "petition to deny or dismiss as inadvertently accepted for tender and filing" filed by BBI and the oppositions filed by OARA and BBI on June 27, 1988 and June 28, 1988, respectively, against Watkins' June 8, 1988 petition for leave to amend and the accompanying amendment ARE DISMISSED.

20. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 5-8 hereinabove, the amendment of June 8, 1988 filed by Watkins IS HEREBY RETURNED.

21. IT IS FURTHER ORDERED, That in the event of a grant of Watkins' application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization, the permittee shall certify to the Commission that her husband, Rodger B. Watkins, has divested his interest in Station KNOW(AM), Lufkin, Texas.

22. IT IS FURTHER ORDERED, That Watkins shall submit the amendment requested hereinabove at paragraph 11 to the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That OARA shall file the information as set forth in paragraph 12 hereinabove with the presiding Administrative Law Judge as soon as it is made available by the EEOC.

24. IT IS FURTHER ORDERED, That in the event of a grant of Heartland's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization, the permittee shall certify to the Commission that its principal, Joseph Abernathy, has divested his interest in Heart of Texas Communications, Ltd., licensee of Stations KTON(AM) and KTQN-FM, Belton, Texas.

25. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: OARA, Watkins.

26. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

27. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] By letter from the Chief, FM Branch dated May 3, 1988, the application filed by Bato Broadcasting, Inc. (BPH-870415MD) and the informal objection filed against the application were dismissed.

[2] On February 8, 1988, BBI filed a "petition to deny or dismiss as inadvertently accepted for tender and filing" against Watkins' application. OARA and BBI filed on June 27, 1988 and June 28, 1988, respectively, oppositions against Watkins' June 8, 1988 petition for leave to amend. These filings are essentially petitions to specify issues. Since the Commission's *Report and Order in re Revised Procedures for the Processing of Contested Broadcasting Applications: Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, these pleadings will be dismissed herein and an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to 47 C.F.R. § 1.229.

[3] The amendment will be accepted in paragraph 14 below, however, to the extent that the applicant has met its § 1.65 obligation by informing the Commission of a change in Mary F. Watkins' address and telephone number.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-470

In re Applications of

Rana Maley Steed d/b/a GRAND COCONINO BROADCASTING	File No. BPCT-861216IP
G & D COMMUNICATIONS, INC.	File No. BPCT-870224KE
CARL M. FISHER	File No. BPCT-870331LC
Chuck Hibbs d/b/a OVERVIEW COMMUNICATIONS, LTD.	File No. BPCT-8703317K

For Construction Permit Flagstaff, Arizona

HEARING DESIGNATION ORDER

Adopted: August 31, 1988; Released: September 23, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 9, Flagstaff, Arizona.[1]

2. On April 21, 1987 and June 10, 1987, the Association of Maximum Service Telecasters (AMST) and KGUN, Inc., licensee of KGUN-TV, Tucson, Arizona, each filed an informal objection to the application of Grand Coconino Broadcasting (GCB). On June 5, 1987, AMST filed an informal objection to the application of Chuck Hibbs. Each objection was based on the ground that GCB and Hibbs both propose the same transmitter site, which would be 291.2 kilometers (km) from co-channel station KGUN-TV, Tucson, Arizona. Sections 73.610 and 73.698 of the Commission's Rules require a minimum separation of 304.9 km between co-channel VHF stations in Zone II. GCB and Hibbs would each be short-spaced 13.7 km. GCB and Hibbs have not responded to the objections. Accordingly, an issue will be specified to determine whether circumstances exist to warrant a waiver of the rule. Since an applicant who proposes a short-spaced site is required to make the threshold showing that no suitable fully spaced site is available, the presiding Administrative Law Judge will, in assessing those circumstances, consider the fact that G & D and Carl Fisher have specified fully-spaced sites.

3. It appears that the Hibbs and GCB contour calculations are inaccurate and not computed in accordance with Section 73.684 of the Commission's Rules. In addition, the contour maps show contours that do not reflect the contour calculations given in Section V-C, Item 15, FCC Form 301. Additionally, the coverage map submitted by GCB is not complete. There are portions of the Grade B contour missing and the scale is not labelled for units of measurement (*i.e.*, km, miles). Accordingly, Hibbs and GCB will each be required to amend its application to provide corrected data in Section V-C, Item 15, corrected contour maps and corrected area and population figures. These amendments must be submitted to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. By a Hearing Designation Order released April 10, 1987, the Commission designated for comparative hearing eight mutually exclusive applications for a construction permit for a new television station on channel 63 in Monroe, Georgia (MM Docket No. 87-83, 2 FCC Rcd 2104), including that of Chuck Hibbs d/b/a Overview Communications, Ltd. (BPCT-8612168L). In that proceeding, issues were specified against Hibbs to determine whether he had reasonable assurance that his proposed transmitter site would be available to him and, if not, whether he made misrepresentations to the Commission. Hibbs' Monroe application, however, was dismissed on May 26, 1987, by the presiding Administrative Law Judge for failure to prosecute. Since these issues raise a question as to Hibbs' basic qualifications to be a Commission's licensee, the issues will be specified and tried in this proceeding. If the issues are, in fact, tried and resolved in this proceeding, any adverse findings and conclusions will be binding in any other proceeding to which Hibbs is a party.

5. Section II, Item 7(b), asks whether the applicant or any party to this application has any interest in or connection with a broadcast application which has been denied by the Commission. GCB has failed to respond to this question. GCB shall submit its response to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. Section V-C, page 3 and Section V-G, page 2 require original signatures. GCB has failed to submit an original signature. GCB shall submit an amendment bearing original signatures to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. Section V-G, Item 2, asks whether the proposed tower site is the same as that of other stations authorized by the Commission and an affirmative response requires the applicant to give the call signs of the other stations. Although GCB responded affirmatively, it has not furnished the required identifications. GCB will, therefore, be required to furnish this information to the presiding Administrative Law Judge within 30 days of the date of release of this Order.

8. From our review of the proposals submitted by Hibbs and GCB, we cannot determine whether the applicants are in compliance with the revised environmental rules set forth in the Report and Order in General Docket No. 79-163, 51 Fed. Reg. 14999 (1986). Under the revised rules, an applicant must determine whether the radiation hazard of its proposal would have a significant environmental effect under the criteria set out in Section 1.1307 of the Commission's Rules. If the application is subject to environmental processing under the Section 1.1307 criteria, the

applicants must then submit an environmental assessment (EA) containing the information delineated in Section 1.1311 of the Commission's Rules. Section 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radio frequency radiation exceeding specific standards. An examination of these applications suggests that they have not followed the procedures outlined above. While it is unlikely that an RF problem exists as a result of the height and power proposed by each applicant, other factors must be evaluated by the applicants in making a final determination. The applicants will will be required to file, within 30 days of the release of this Order, a statement or showing with respect to radiation hazards that might have an adverse effect on the quality of the environment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Television Branch, Mass Media Bureau, who will then proceed regarding this matter in accordance with the provisions of Section 1.1308. A copy of the statement must also be filed with the Chief, Hearing Branch, Mass Media Bureau. Accordingly, a contingent environmental issue will be specified, and the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See, Golden State Broadcasting*, 71 FCC 2d 229 (1979). *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

9. On June 26, 1985, the Commission issued a Public Notice (Mimeo No. 5421) requiring all applicants for new broadcast stations to certify that they have obtained reasonable assurance that their specified transmitter sites will be available to them. Fisher has not submitted such a certification. Accordingly, Fisher will be given 30 days from the date of release of this Order to file such a certification, in the form required by the Commission, with the presiding Administrative Law Judge. If the applicant cannot make the certification, he shall so advise the Administrative Law Judge who shall then specify an appropriate issue.

10. No determination has been reached that the tower height and location proposed by Fisher would not constitute a hazard to air navigation. Accordingly, an appropriate issue will be specified.

11. On September 15, 1987, the Commission released a Hearing Designation Order (MM Docket 87-373) designating for comparative hearing five mutually exclusive applications for a construction permit for a new television station to operate on channel 29 in Charleston, West Virginia, including that of Carl M. Fisher (BPCT-870121KK). In that proceeding, the Commission specified an issue to determine whether Fisher was financially qualified to construct and operate six television stations for which he filed applications which had not then been designated for hearing. The Commission also specified an issue to determine whether Fisher had falsely certified in each application that he was financially qualified. The Order provided that, in order to conserve Fisher's resources as well as those of the Commission, the issues would be tried in that proceeding with respect to all of Fisher's applications which had not then been designated for hearing and that Fisher would thereby be precluded from relitigating in any subsequent proceeding any adverse findings and conclusions made against him in that proceeding. Therefore, any adverse findings and conclusions made with respect to Fisher in Docket No. 87-373 were to be binding in this proceeding and were not to be relitigated here. Fisher's Charleston application, however, was dismissed by the presiding Administrative Law Judge on November 6, 1987, for failure to prosecute.[2] Consequently, since the issues cannot be tried in the Charleston proceeding or in any other proceeding to which Fisher is a party (see Footnote 2) the issues will be specified in this proceeding.

12. The technical data submitted by the applicants indicate that there would be a significant difference in the size of the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 56 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Section IV, FCC Form 301, requires an applicant for a television station to submit, as an exhibit, a brief description, in narrative form, of its planned programming service relating to the issues of public concern facing the proposed service area. None of the applicants has submitted such an exhibit. Accordingly, each applicant must file the appropriate exhibit with the presiding Administrative Law Judge within 30 days after this Order is released.

14. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Grand Coconino Broadcasting and Chuck Hibbs, whether circumstances exist which would warrant waiver of Sections 73.610 and 73.698 of the Commission's Rules.

2. To determine, with respect to Carl M. Fisher:

(a) The basis for, and the validity of, Carl M. Fisher's estimate of costs to build six new television stations and to operate them without revenues for three months.

(b) Whether Carl M. Fisher had sufficient net liquid assets on hand or available from committed sources to construct and operate the six stations for three months without revenues.

(c) Whether Carl M. Fisher falsely certified that at the time each application was filed, he had sufficient net liquid assets on hand or available from committed sources to construct and operate the six stations for three months without revenues.

(d) If issue (c), above, is resolved in the affirmative, the effect thereof on Carl M. Fisher's basic qualifications to be a Commission licensee.

(e) Whether Carl M. Fisher has sufficient net liquid assets on hand or available from committed sources to construct and operate the proposed Flagstaff station for three months without revenues.

(f) Whether, in light of the evidence adduced pursuant to issue (e), above, Carl M. Fisher is financially qualified.

(g) Whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

3. To determine, with respect to Chuck Hibbs:

(a) Whether the applicant had reasonable assurance that the proposed site specified in MM Docket No. 87-83 would be available to him;

(b) Whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant misrepresented to the Commission the availability of his specified site;

(c) If issue 3(b), above, is resolved in the affirmative, the effect thereof on the applicant's basic qualifications.

4. If a final environmental impact statement is issued with respect to Chuck Hibbs d/b/a Overview Communications and Grand Coconino Broadcasting which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act as implemented by Sections 1.1301-1.1319 of the Commission's Rules.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

16. IT IS FURTHER ORDERED, That Grand Coconino Broadcasting and Chuck Hibbs shall each submit an amendment correcting its contour calculations, new contour maps, and area and population figures, as set out in paragraph 3, *supra*, to the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That Chuck Hibbs and Grand Coconino Broadcasting shall each submit an amendment which contains an environmental statement as explained in paragraph 8, above, to the presiding Administrative Law Judge and a copy to each the Chief, Television Branch and the Chief, Hearing Branch, Mass Media Bureau, within 30 days after this Order is released.

18. IT IS FURTHER ORDERED, That Grand Coconino Broadcasting shall submit its response, as set out in paragraph 5, *supra*, to the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That Grand Coconino Broadcasting shall submit an amendment bearing original signatures in connection with Section V-C, Page 3 and Section V-G, Page 2, FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That Grand Coconino Broadcasting shall submit the call letters of other stations at its proposed site as set out in paragraph 7, *supra*, to the presiding Administrative Law Judge within 30 days of the release of this Order.

21. IT IS FURTHER ORDERED, That Carl Fisher shall file an original site availability certification, in the form required by the Commission, with the presiding Administrative Law Judge within 30 days of the release of this Order.

22. IT IS FURTHER ORDERED, That the amendments filed by G & D Communications, Inc. ARE ACCEPTED for 1.65 purposes only.

23. IT IS FURTHER ORDERED, That each applicant shall submit an amendment with the proper response to Section IV, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

24. IT IS FURTHER ORDERED, That the Association of Maximum Service Telecasters, Inc. and KGUN, Inc. ARE MADE PARTIES RESPONDENT to this proceeding with respect to issue 1.

25. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 2(g).

26. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the parties respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of 6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

27. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Service Division
Mass Media Bureau

FOOTNOTES

[1] G & D Communications, Inc. filed amendments after the "B" cut-off date. The amendments were filed to reflect other broadcast interests. The amendments are accepted for Section 1.65 purposes only and no comparative advantage will accrue thereby.

[2] Fisher's other applications which have been designated for hearing have all been dismissed by an Administrative Law Judge for failure to prosecute: BPCT-870212KG for channel 66 in Fairmont, West Virginia, on August 14, 1987; BPCT-870121KJ for

channel 36 in Sioux Falls, South Dakota, on July 17, 1987; and BPCT-870121KL for channel 21 in Minden, Louisiana, on January 22, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-466

In re Applications of

Pedro O. Seda, M.D. d/b/a YAUCO TELEVISION BROADCASTING	File No. BPCT-870623KI
MARANATHA CHRISTIAN NETWORK	File No. BPCT-870812KF

For Construction Permit Yauco, Puerto Rico

HEARING DESIGNATION ORDER

Adopted: August 31, 1988; Released: September 23, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for authority to construct a new commercial television station on Channel 42, Yauco, Puerto Rico.[1]

2. No determination has been reached that the tower height and location proposed by each of the applicants would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

3. The technical data submitted by each applicant indicate that there would be a significant difference in the size of the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

4. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by each of the applicants would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

7. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of 6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTE

[1] An application was also filed an August 12, 1987, by Telemundo Group, Inc. for authority to operate on Channel 42. Telemundo's application was voluntarily dismissed on August 1, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-468

In re Applications of

SANDERS BROADCASTING COMPANY LIMITED PARTNERSHIP (hereafter Sanders)	File No. BPH-870729MB
JULIA M. CARSON (hereafter Carson)	File No. BPH-870729MC
METRO BROADCASTERS d/b/a GREENWOOD MEDIA (hereafter Media)	File No. BPH-870729MD
GREATER GREENWOOD BROADCASTING LIMITED PARTNERSHIP (hereafter Greater)	File No. BPH-870729ME
HEARTLAND RADIO LIMITED PARTNERSHIP (hereafter Heartland)	File No. BPH-870729MK

For a Construction Permit for a
New FM Station on Channel 294A in
Greenwood, Indiana

HEARING DESIGNATION ORDER

Adopted: September 2, 1988; Released: September 23, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Heartland.* Heartland states in Exhibit 1 of its application that "Fredric C. Gordon is an employee, but not an officer, director or shareholder, of Media Comm 1 Limited Partnership, licensee of commercial FM broadcast station WTLC(FM), Indianapolis, Indiana." Mr. Gordon pledges he will resign his position upon grant of the Greenwood application. Accordingly, in the event Heartland's application is granted, Mr. Gordon will be required to resign his employment with Media Comm 1 Limited Partnership.

3. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after October 7, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Sanders	11/16/87 (eng.); 2/3/88 (eng.)
Media	10/26/87 (eng.); 12/15/87 (eng.); 1/19/88; 3/18/88; 5/23/88
Greater	10/26/87; 12/31/87

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in the event of a grant of Heartland's application, Fredric C. Gordon will be ordered to resign his position with Media Comm 1 Limited Partnership and sever all connections with WTLC(FM).

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Sanders, Carson, Media, Greater.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

EDM CELLULAR File No. 63500-88-17-MAF

Domestic Public Cellular
Telecommunications Service
Frequency Block A, Parkersburg-
Marietta, West Virginia-Ohio MSA

MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF APPARENT LIABILITY

Adopted: September 14, 1988;Released: September 23, 1988

By the Chief, Mobile Services Division:

1. On June 16, 1988, a Notice of Apparent Liability for Forfeiture was issued by letter assessing a forfeiture in the amount of 2000 against EDM Cellular (EDM) for failure to respond to the Commission's written request for additional information with respect to its construction permit for the Parkersburg-Marietta, West Virginia-Ohio MSA. EDM through its attorney, requests that the proposed forfeiture be set aside or substantially reduced.

BACKGROUND

2. On March 23, 1988, the Commission sent a letter to EDM, requesting a copy of the FAA determination for its proposed antenna structure at Stanleyville, Ohio. A written response was requested within 30 days of its receipt. No response was provided. On May 2, 1988, the Commission was contacted by Mr. Charles Watts attorney for EDM. Mr. Watts indicated that due to a change of address for EDM the Commission's letter was not received until after the specified time period for a response had passed. Mr. Watts was advised that the Commission had no record of a change of address for EDM and that EDM should respond to the Commission's request. However no response was received, and on June 16, 1988 the Commission issued its initial Notice of Apparent Liability For Forfeiture. The notice was sent to EDM, by certified mail, at the following address, the address of record for EDM:

EDM Cellular
1234 Massachusetts Avenue, N.W.
Washington, D.C. 20005

The letter was returned by the U.S. Postal Service as *MOVED, NOT FORWARDABLE.*

3. On April 25, 1988, the Commission received an application from EDM for assignment of its construction authorization for Parkersburg-Marietta . This application lists the aforementioned Massachusetts Ave. address as the mailing address for EDM. In addition, the assignment application also lists the following address for EDM:

Friendship Station
P.O. Box 9426
Washington, D.C. 20016

On July 25, the Commission issued a second Notice of Apparent Liability For Forfeiture against EDM. This notice was sent by certified mail to the Friendship Station address. The letter was returned by the U.S. Postal Service as UNCLAIMED.

ARGUMENTS

4. On August 15, 1988 EDM through its attorney filed a written response to the Notice of Apparent Liability for Forfeiture, arguing that the forfeiture is not merited or at the very least should be substantially reduced. EDM says that failure to provide the Commission with the requested information was inadvertent and not deliberate. In addition, an accidental oversight, exacerbated by the fact that both the Commission's original request for FAA determination and the first letter assessing a forfeiture against EDM were sent to EDM's old address, caused the problem.

DISCUSSION

5. After reviewing the information filed by EDM in its response to the Notice of Apparent Liability For Forfeiture and the aforementioned sequence of events, we find that EDM has not demonstrated sufficient reasons to set aside or to mitigate the forfeiture. It was not until receipt of EDM's correspondence of August 15, 1988, more than 4 months from the Commission's original letter of March 23, that a written response of any kind was submitted to the Commission. Furthermore, as evidenced by the returned correspondence, EDM has still not provided the Commission with its current mailing address, and therefore has failed to keep its station file and pending application up to date as required by Section 1.65 of the Commission's Rules. In addition, EDM has still not provided the required FAA clearance. Because EDM has not provided the requested information and has not provided the Commission with its current address, we have decided to affirm the assessment of the original 2000 forfeiture and to assess another 2000 forfeiture for EDM's continued failure to provide the Commission with its correct address and to provide the required FAA clearance.

6. In view of the foregoing, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Rules, IT IS ORDERED, that EDM Cellular FORFEIT to the United States the sum of four thousand dollars (4000) for the violation of Sections 22.302(a) and 1.65 of the Commission's Rules. Payment of the original 2000 forfeiture may be made by mailing a check or similar instrument to the Commission payable to the Federal Communications Commission within 30 days of the release of this order. If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act.

7. With regard to the additional forfeiture of 2000, EDM may take any of the actions set forth in Section 1.80 of the Commission's Rules and as summarized in the attachment to this order.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HERALDCOM, INC. File No. CSG-88-030-P L

Application for authority to
construct and operate international
earth station facilities at Saipan
for provision of receive-only
audio service

ORDER AND AUTHORIZATION

Adopted: September 9, 1988; Released: September 23, 1988

By the Chief, International Facilities Division:

1. The captioned application filed by Heraldcom, Inc. (Heraldcom) on February 16, 1988, and amended by letter of August 1, 1988, requests authority pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities on the island of Saipan for provision of international audio reception service. The application was placed on public notice on March 16, 1988. No comments were received.

2. The proposed receive-only earth station will consist of a 4.57 meter antenna communicating with the INTELSAT V Pacific Ocean Region (POR) satellite located at 186 degrees West Longitude in the 4 GHz band. The facilities will be located on the island of Saipan and will be used to provide audio reception service from the continental U.S.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[1] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[2] The Commission has granted many applications to construct and operate IBS earth stations based on this approach. [3]

4. We find that the applicant has the legal, technical and financial qualifications to construct and operate the proposed earth station facilities. Heraldcom is a corporation incorporated under the laws of Massachusetts and is a wholly-owned subsidiary of Christian Science Monitor Syndicate, Inc. (CSM). CSM is licensee of several radio stations, including one in Saipan. The proposed earth station shall comply with INTELSAT Standard F-1 technical parameters for earth stations. Heraldcom has completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be audio receive-only service as requested by the applicant. Any use of the proposed station as a multipurpose station or for any two-way communications service would require additional Commission authorization.

6. Upon consideration of the application, we find that authorization of the construction and operation of the requested service and facilities is in the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-88-030-P/L is GRANTED, and Heraldcom is authorized to construct and operate the proposed earth station facilities at Saipan to provide audio receive-only service from the continental U.S. Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed. The Commission retains jurisdiction over this matter to insure that all present and future authorized carriers and other authorized users have non-discriminatory use of and equitable access to the communications satellite system, and the earth station authorized herein for off-island services.

8. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).

[2] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[3] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUERTO RICO
TELEPHONE COMPANY,
Complainant,

v. File No. E-87-42

AT&T OF PUERTO RICO, INC.,
Defendant.

ORDER

Adopted September 15, 1988; Released: September 15, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. Before us is a "Motion to Dismiss Complainant's Damage Claims" filed by All America Cables and Radio, Inc. (AAC&R)[1] on June 15, 1987.[2] For reasons discussed below, the relief requested by AAC&R is granted.

2. This proceeding was initiated on February 24, 1987, by the filing of a formal complaint by the Puerto Rico Telephone Company (PRTC). PRTC alleged therein that AAC&R charged unreasonably high rates for its international message telecommunications service (IMTS) between Puerto Rico and foreign points during the period 1984 to 1986. Among other relief requested in its complaint, PRTC sought damages for injuries allegedly sustained by PRTC and its ratepayers as a consequence of such rates. [3]

3. In the instant motion, AAC&R contends, *inter alia*, that PRTC lacks standing to represent its ratepayers and to assert claims for damages on their behalf.[4] PRTC stands in an arms-length, carrier-to-customer relationship with subscribers to its services and, as AAC&R notes, PRTC's interests may diverge from those of such customers.

4. Under the Commission's Rules, a complainant may not generally allege that it seeks damages on behalf of a class of unidentified ratepayers. Rather, the complaint must identify by name and address each individual claimant seeking damages;[5] state the nature and amount of injury sustained by each claimant;[6] and if the complaint seeks damages on behalf of others, state "in what capacity or by what authority complaint is made in their behalf."[7] The Commission's Rules are fundamentally imcompatible with the assertion of class action damage claims of the sort PRTC seeks to plead in this proceeding, and we have previously indicated that such complaints would not be acceptable for filing.[8]

5. Furthermore, as a potential competitor with AT&T-PR to provide IMTS, PRTC has not shown that it has adequate incentive to litigate claims of others, if any, that AT&T-PR's current rates for these services are too high. Accordingly, even if PRTC had shown that it had authority to represent others, and the Commission's Rules permitted it to assert claims in a representative capacity, PRTC has not shown that it is a proper representative of others under standards traditionally applied in class action cases.[9]

6. In view of the foregoing, PRTC's complaint will be dismissed insofar as it seeks monetary damages on behalf of unidentified individuals who are not parties to this proceeding.

7. PRTC's complaint will also be dismissed insofar as PRTC asserts that it has been injured because of the challenged rates. Even if PRTC had shown that the challenged rates were excessive,[10] it failed to show that it was a user of AAC&R's international services and that it paid charges for any such service. PRTC did not even attempt to show that it suffered any direct injury by payment of alleged unreasonable charges. To the extent that PRTC claims that it has been indirectly injured because of revenues it allegedly lost as a result of the challenged rates, its claims are remote, speculative and unsupported even if they were compensable under the Act.[11]

8. In sum, PRTC has failed to show that it has suffered any cognizable injury which would justify an award of damages pursuant to a section 208 proceeding.[12]

9. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the "Motion to Dismiss Complainant's Damage Claims" filed by all America Cables and Radio, Inc., on June 15, 1987, IS GRANTED.

10. IT IS FURTHER ORDERED that the complaint filed by the Puerto Rico Telephone Company on February 24, 1987, IS DISMISSED insofar as it requests damages and attorney fees.

11. IT IS FURTHER ORDERED that, unless PRTC notifies the Enforcement Division, Common Carrier Bureau, within thirty days of the release of this Order it desires to further prosecute its complaint in this matter, the complaint will be dismissed.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] AAC&R's name was changed to AT&T of Puerto Rico, Inc. (AT&T-PR) after AT&T acquired AAC&R from an ITT Corporation subsidiary in July 1987.

[2] Also before us are an opposition filed by complainant, the Puerto Rico Telephone Company on June 29, 1987, and a reply filed by AAC&R on July 13, 1987.

[3] PRTC also requested "reasonable attorneys' fees against Defendant pursuant to Section 206 of the Communications Act . . . ." (Complaint at 4.) That section authorizes the award of counsel fees in a court action and not in a Commission proceeding. It is well settled that the Commission has no authority to award attorney fees in a section 208 proceeding. WSAZ, Inc. v. AT&T, 31 FCC 175, 194 (1961); Comark Cable Fund III, 100 FCC 2d 1244, 1257 at n.51, *remanded on other grounds*, Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205 (1987); Illinois Bell

Telephone Co., 46 R.R. 2d 1449 (1980); Stroud v. Western Union, 70 FCC 2d 506, 511, 567 (1978), *aff d*, Stroud v. FCC, No. 78-2078 (D.C. Cir. Mar. 12, 1980), *cert. denied*, 449 U.S. 870 (1980). *See also* Winnebago Farmers Elevator Co. v. Chicago & N.W. Transportation Co., 354 I.C.C. 859, 883 (1978); Hightower Box & Tank Co., 294 I.C.C. 503 (1955). Accordingly, such request is denied.

[4] Although PRTC performed the billing function for AAC&R, the charges complained about were AAC&R's tariffed charges to its own subscribers in Puerto Rico. Those charges were borne directly by the subscribers, rather than by PRTC.

[5] 47 C.F.R. § 1.723(a)(2).

[6] *Id.* at § 1.723(a)(7).

[7] *Id.* at § 1.723(a)(9).

[8] Certified Collateral Corp. v. Allnet Communication Services, Inc., 2 FCC Rcd 2171, 2173 (1987). *See also* Telecommunications Research & Action Center v. Allnet Communication Services, Inc., 806 F.2d 1093 (D.C. Cir. 1986) (association of users had no standing to pursue monetary damages for its individual members who were not parties to the proceeding).

[9] Fed. R. Civ. P. 23(a)(4). Dura-Bilt Corp. v. Chase Manhattan Corp., 89 F.R.D. 87 (S.D.N.Y. 1981) (class representative inadequate when interests or characteristics of proposed representative conflict with those of class).

[10] AT&T-PR notes that PRTC's attempt to show that the challenged rates were excessive was based on, among other erroneous assumptions, an assumption that the cost characteristics of the cable facilities used by AAC&R to provide international service were identical to the cost characteristics of the satellite facilities used to provide interstate service. As noted by AT&T-PR, its international service has been provided principally by cable, where costs vary with the length of the circuit, whereas its interstate service has been provided predominantly by satellite, where costs do not vary with the distance between the two points of the call.

[11] According to AT&T-PR, PRTC's claim for damages for indirect injury should be dismissed as beyond the scope of damages that are compensable under the Act. AT&T also contends that 47 U.S.C. § 415(b), the applicable statute of limitations, forecloses PRTC's recovery of damages for alleged injuries sustained prior to February 25, 1985, relying in this connection on Armstrong Utilities, Inc., 25 FCC 2d 385, 389-90 (1970), and Midstate Horticultural Co. v. Pennsylvania R. Co., 320 U.S. 356, 366-67 (1943).

[12] PRTC also requested that the Commission institute a full evidentiary ratemaking hearing pursuant to section 205 of the Act and prescribe future rates for AT&T-PR's international services. We are not persuaded on the basis of the entire record in this case to recommend institution of such a hearing absent a more compelling showing that AT&T-PR's currently effective rates are excessive as PRTC alleges. In this connection, in addition to the pleadings identified in note 2, *supra*, we have considered the evidence and arguments contained in PRTC's complaint, AAC&R's answer thereto filed April 6, 1987, PRTC's reply filed April 21, 1987, and AT&T-PR's evidentiary response filed November 27, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Petition of the

PUERTO RICO TELEPHONE AUTHORITY

For a Declaratory Ruling that a Subsidiary Corporation Offering Interstate and International Message Telephone Service Off of the Island of Puerto Rico is Nondominant

File No. ENF-88-15

MEMORANDUM OPINION AND ORDER

Adopted:September 14, 1988; Released:September 15, 1988

By the Chief, Common Carrier Bureau:

1. The Puerto Rico Telephone Authority (PRTA) has requested a declaratory ruling that La Telefonica Larga Distancia de Puerto Rico (LTLD), a new subsidiary of PRTA which will provide message telephone service between Puerto Rico and off-island interstate and international points, will be nondominant (Petition). For reasons discussed below, we grant PRTA's Petition.

I. BACKGROUND

2. PRTA is a public service corporation of the Commonwealth of Puerto Rico[1] and owns all of the stock of the Puerto Rico Telephone Company (PRTC), which provides local and intra-island telephone service to approximately ninety percent of the Commonwealth.[2] PRTC has previously applied for authorization to provide interstate message telephone service (MTS) and international message telephone service (IMTS) on an unseparated basis. [3] On October 15, 1987, the Commission released its decision in CC Docket No. 86-309,[4] an inquiry into policies to be followed in the authorization of common carrier facilities to provide telecommunications service off the island of Puerto Rico. The Commission there found that the public interest would be served by competition in the domestic off-island market[5] and also in a number of growing off-island international telecommunications markets where competition was generally feasible.[6] The Commission further found that PRTC should be permitted to provide off-island MTS and IMTS on an unseparated basis if it complied with certain conditions designed to minimize potentially unfair competitive advantages accruing to PRTC as a local exchange carrier (LEC) that would provide off-island services on an integrated basis with its local and other intra-island services.[7]

3. On December 28, 1987, PRTC filed amendments to its pending off-island applications, purporting to comply with all of the conditions imposed by the Commission as prerequisites for its entry into the off-island services market. In response, AT&T filed Petitions to Deny or Defer PRTC's applications, arguing that PRTC had failed to demonstrate compliance with the prerequisites. This matter remains pending before the Commission.

4. The Commonwealth, PRTC and AT&T also are engaged in disputes over numerous other matters before the Commission and, after intensive negotiations to resolve their differences, recently reached an agreement for a comprehensive settlement of their pending disputes. PRTA's Petition was filed after the agreement was reached and its filing constitutes one part of the overall settlement agreement.

II. PRTA'S PETITION FOR DECLARATORY RULING

5. On August 19, 1988, PRTA filed the instant Petition requesting a declaratory ruling that, if it provides MTS and IMTS between Puerto Rico and off-island points, it will be treated as a nondominant carrier. In support thereof, PRTA represents that LTLD will be a separate corporation with separate books of account from PRTC and will not own any switching or transmission facilities jointly with PRTC. PRTA further represents that LTLD will obtain tariffed services from PRTC pursuant to tariff, and will obtain any detariffed services from PRTC on an arm's length, nondiscriminatory basis. These restrictions will be supplemented by additional restrictions and limitations imposed by Puerto Rico law on the activities of a public corporation.[8] Accordingly, PRTA contends that LTLD will satisfy all of the requirements for nondominant status for its domestic interstate service established by the Commission in the *Fifth Report and Order* in the *Competitive Carrier Proceeding*,[9] which the Commission has specifically applied to Puerto Rico.[10] PRTA contends that under established Commission precedent, LTLD should be treated as a forborne carrier for its domestic service and should be treated as nondominant for its international services. In view of the strong public interest in facilitating competition in the off-island services market, and the importance of a prompt decision on this issue in accordance with the settlement agreement recently reached between AT&T and PRTA, PRTA seeks an expedited decision on its Petition.

6. On August 22, 1988, we issued a public notice giving interested parties the opportunity to file comments by September 2, 1988, and reply comments no later than September 9, 1988.[11] Comments were timely filed by American Satellite Company d/b/a as Contel ASC (Contel ASC) and IT&E Overseas, Inc. (IT&E).[12] Contel ASC[13] urges expeditious grant of PRTA's petition. According to Contel ASC, providing MTS and IMTS through LTLD will satisfy long-standing Commission requirements for nondominant status and regulatory treatment. Contel ASC further asserts that LTLD's provision of domestic and international MTS services also will be consistent with the Commission's policy decision in *Off - Island Services Report and Order* concerning competition in services between Puerto Rico and off-island points, and that such competition will serve the public interest.

III. DISCUSSION

A. *Impact of CC Docket 86 - 309*

7. In its October 15, 1987 *Off - Island Services Report and Order*, *supra*, the Commission responded to an earlier request by PRTC to provide off- island services on an unseparated and fully integrated basis and found that PRTC's entry into domestic and international off-island markets would bring competition to Puerto Rican MTS and IMTS users and, as a result, would promote the public interest.[14] However, the Commission was concerned about PRTC's control of local exchange bottleneck facilities, with the attendant potential for cross-subsidy and anticompetitive conduct, and, thus, imposed interconnection requirements and nonstructural safeguards on PRTC.[15]

8. It is clear from that decision that the Commission decided to impose nonstructural safeguards in large part based on the fact that PRTC proposed nonseparated and fully integrated off-island and local and intra-island operations. Thus, the Commission noted:

> We have not generally required that local exchange carriers entering the interexchange market do so through separate subsidiaries although these entrants have typically employed some form of structural separation . . . . *The use of a separate corporate entity for the provision of interexchange service by a LEC obviously reduces the need for other safeguards to ensure fair competition* (emphasis added, citation omitted) .[16]

In other words, where PRTC specifically proposed unseparated and fully integrated local exchange and off-island services, the Commission found a need to impose nonstructural safeguards because of the anticompetitive threats posed by PRTC's control of bottleneck local exchange facilities. For this same reason, the Commission concluded that PRTC must be treated as a dominant carrier pursuant to its provision of IMTS.[17] However, in the instant case, PRTA proposes to provide interexchange and international off-island services via LTLD, *i. e.*, not on an unseparated and fully integrated basis. Thus, the factual predicate for the Commission's treatment of PRTC in the *Off - Island Services Report and Order* does not exist as applied to LTLD. It remains for us to determine whether LTLD should be treated as a nondominant provider of interexchange and international services pursuant to other controlling Commission precedent.

B. *Domestic Off - Island Services*

9. Whether or not LTLD will be entitled to regulatory forbearance in providing its domestic, off-island services depends upon a finding that it will conform to the guidelines specified in the *Fifth Report and Order* governing interexchange services provided by affiliates of LECs. In the *Fourth Report*, the Commission found that the domestic, interexchange, interstate services of all carriers affiliated with exchange telephone companies are nondominant.[18] As a result, domestic, interstate, interexchange resellers affiliated with local exchange telephone companies were subject to forbearance and facilities-owning domestic, interstate interexchange carriers affiliated with exchange telephone companies were placed under streamlined regulation.[19] Thereafter, in the *Fifth Report and Order*, the Commission concluded th facilities-owning domestic, interstate, interexchange carri affiliates should also be subject to forbearance princip and discussed what is required in order to be treated as "affiliate" for purposes of qualifying for nondominant re ulation.[20]

10. According to the *Fifth Report and Order*, a carri affiliated with an exchange telephone company "is a ca rier that is owned (in whole or part) or controlled by, under common ownership (in whole or part) or contr with the exchange telephone company."[21] After setting o this definition, the Commission went on to discuss vario requirements imposed on affiliates and designed to pr vide an appropriate level of protection against cost shifti and anticompetitive conduct by affiliates who otherwi could improperly exploit their close relationship with t dominant carrier. The Commission required the affiliate maintain separate books of account and prohibited joi ownership of transmission or switching facilities with t exchange telephone company.[22] The Commission also sti ulated that if the affiliate uses any of the exchange co pany's services, it must acquire those services und tariff.[23] Notwithstanding these requirements, the Commi sion stated that "an affiliate qualifying for nondomina treatment is not necessarily structurally separated from a exchange telephone company in the sense ordered in t Second Computer Inquiry . . . ."[24] In this latter regard, t Commission noted that fully-separated personnel and ma keting staffs -- required by the Commission's Order in t Second Computer Inquiry -- are not part of the requir ments for affiliates to be found nondominant in the co text of the *Competitive Carrier Proceeding*.[25]

11. An examination of PRTA's submissions leads us conclude that LTLD will qualify for forbearance treatme as a nondominant domestic, interstate, interexchange affi ate of a local exchange carrier. LTLD will be an intere change carrier wholly-owned by PRTA which also whol owns PRTC, a LEC.[26] Thus, LTLD is "a carrier . . . unde common ownership (in whole or part) or control with, exchange telephone company."[27] Further, PRTA indicate that LTLD will maintain books of account separate fro those books of account maintained by PRTC and tha LTLD and PRTC will jointly own neither transmissio facilities nor switching facilities.[28] Any regulated service of PRTC employed by LTLD will be obtained pursuant t tariffs filed by PRTC.[29] In short, the organization an proposed operation of LTLD satisfy all the requirement imposed by the *Fifth Report and Order* and LTLD, there fore, should be treated as nondominant in its provision o domestic interexchange services.

C. *International Off - Island Services*

12. We are also persuaded that LTLD should be foun nondominant pursuant to its provision of IMTS. Co sequently, LTLD will be subject to streamlined regulatio pursuant to the Commission's *International Competitiv Carrier* decisions.[30]

13. In this regard, we first note the Commission's ge eral finding in the *International Competitive Carrier Orde* that there are no dominant IMTS providers except thos enumerated in that order, including certain noncontiguou United States IMTS providers.[31] The decision to ascrib dominance to these IMTS providers was made based upo two considerations. First, the Commission found that these providers did not face effective competition in their mar kets.[32] Second, the Commission found that most of th

noncontiguous United States IMTS providers also controlled access to local exchange service, *i. e.*, as bottleneck service providers.[33] Thus, where no IMTS competition exists and/or the IMTS applicant is in control of bottleneck LEC facilities, we are obliged to treat an IMTS applicant as dominant.

14. The overwhelming majority of IMTS provided from Puerto Rico to the mainland is currently provided by AT&T of Puerto Rico, Inc. (AT&T- PR), formerly All America Cables and Radio, Inc. (AAC&R). AT&T-PR/AAC&R is the traditional provider of IMTS on Puerto Rico. Because of its significant market share, AT&T-PR has been declared to be a dominant carrier by the Commission.[34] LTLD, of course, currently has no share of off-island communications to any international point. Thus, LTLD will face substantial existing competition in the Puerto Rico off-island IMTS market. Further, because it will be an entity separated from PRTC, there is no evidence that LTLD will control access to the local exchange bottleneck. The Commission has consistently found that separation is an effective means by which to prevent abuses of bottleneck control by firms who also provide competitive services.[35] In the case of a LEC seeking to provide domestic interexchange services, the Commission has required less than that structural separation mandated by the Second Computer Inquiry. Nevertheless, the Commission has required an interexchange affiliate to observe certain operational guidelines expressly designed to prevent the affiliate from benefiting from the LEC's control of bottleneck facilities. These guidelines include requirements that the affiliate maintains separate books of account, obtains LEC services under tariff, and does not own switching or transmission facilities jointly with the LEC.[36] In the instant case, LTLD is obligated to follow these guidelines and states that it will do so. Thus, since we find that LTLD will face existing competition and there is no evidence that it will control bottleneck local exchange facilities, we conclude that LTLD should be treated as a nondominant IMTS provider and, as such, is subject to streamlined regulation.

15. In sum, the Commission's treatment of PRTC as a dominant carrier in CC Docket 86-309 was predicated on PRTC's decision at that time to provide domestic and international off-island service on an unseparated and fully integrated basis. Where, as in the instant proceeding, separated or affiliated domestic operations are proposed, the Commission's orders in *Competitive Carrier* dictate that the interexchange subsidiaries should be treated as nondominant and subject only to that regulation appropriate to nondominant carriers. Similarly, where a carrier's international services face effective competition and the carrier does not control bottleneck local exchange facilities, the Commission's reasoning in *International Competitive Carrier* dictates that the carrier's international off-island services will be treated as nondominant. PRTA represents that it will provide domestic and international off-island services by means of a subsidiary separated from the local exchange carrier and this subsidiary, LTLD, will operate in conformity with conditions spelled out in the Commission's *Competitive Carrier* and *International Competitive Carrier* decisions.[37] Additionally, we note that no one opposes PRTA's Petition. Accordingly, we determine that LTLD will be nondominant.[38]

16. We emphasize that our inquiry is limited to the narrow issue before us, namely, whether LTLD should be found nondominant in its provision of domestic and international off-island services. In promulgating long-term equal access and interim access requirements for PRTC in the *Off - Island Services Report and Order*, *supra*, the Commission addressed issues broader than the anticompetitive concerns addressed in the domestic *Competitive Carrier* and *International Competitive Carrier* proceedings. Our action concerning LTLD's nondominant status for off-island telecommunications services affects the tariff and facilities authorization procedures applicable to LTLD. Our action should not be construed as modifying in any way the conditions specified by the Commission in the *Off - Island Services Report and Order*, *supra*, for entry into off-island telecommunications markets by PRTC or PRCA, as distinguished from LTLD. Specifically, our action is intended to modify neither PRTC's nor PRCA's obligations under outstanding Commission orders to provide timely access arrangements for domestic and international off-island carrier services nor the Commission's expectations in that regard based on representations to it made by the Commonwealth of Puerto Rico, PRTC and/or PRCA.[39]

IV. CONCLUSION

17. Based upon PRTA's representations in the instant Petition, we conclude that LTLD will satisfy all of the requirements for regulation as a nondominant carrier for its MTS and other services between Puerto Rico and off-island domestic and foreign points.

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Petition for Declaratory Ruling filed by the Puerto Rico Telephone Authority on August 19, 1988, IS GRANTED.

19. IT IS FURTHER ORDERED that this Order IS EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Five of the seven members of PRTA's Board of Directors are appointed by the Governor of Puerto Rico and confirmed by the Senate of Puerto Rico, and two are elected directly by the telephone ratepayers of the Commonwealth.

[2] The remainder is served by the Puerto Rico Communications Authority (PRCA), a separate public service corporation of the Commonwealth.

[3] PRTC Application to Provide MTS Through a Satellite Earth Station at Campo Rico, File No. W-P-C-6046, PRTC Applications to Construct an International Earth Station at Humacao, and Provide Off-Island International Services, File Nos. CSG-85-048-P and I-T-C-85-157-A-1; PRTC Application to Acquire 16 Circuits for Service to Canada, File No. I-P-C-81-039-A-1.

[4] Common Carrier Facilities Off of the Island of Puerto Rico, 2 FCC Rcd 6600 (1987), *Petitions for Reconsid. Pending* (*Off - Island Services Report and Order*).

[5] *Id.* at 6605.

[6] *Id.*

[7] *Id.* at 6611-12.

[8] For any acquisition of goods and services of more than 10,000, LTLD will also be required to comply with the Commonwealth's public competitive bidding procedures. During election years, LTLD will in addition confront further limitations under the Puerto Rico election laws on its ability to advertise, hire personnel or make any new expenditures.

[9] Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket 79-252), Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rule Making, 84 FCC 2d 445 (1981), Second Report and Order, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983), Second Further Notice of Proposed Rule Making, FCC No. 82-187 (released Apr. 21, 1982), Third Further Notice of Proposed Rule Making, 48 Fed. Reg. 28,292 (1983), Third Report and Order, 48 Fed. Reg. 46,791 (1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fourth Further Notice of Proposed Rule Making, 96 FCC 2d 922 (1984), Fifth Report and Order, 98 FCC 2d 1191 (1984), *recon. denied*, FCC 85-572 (released Nov. 20, 1985), Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated and remanded sub nom.*, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (*Competitive Carrier Proceeding*).

[10] *Id.* ; *see* 95 FCC 2d at 556.

[11] Public Notice, DA 88-1305 (August 22, 1988).

[12] IT&E is a nondominant resale carrier based in Guam and provides MTS and IMTS to and from Guam and Saipan in competition with RCA Global Communications, Inc. (RCA Globcom), and Micronesia Telephone Corporation, the dominant provider of such services in Guam and Saipan, respectively. Simultaneously with the filing of its comments, IT&E filed a Freedom of Information Act (FOIA) request for disclosure of the parties' settlement agreement. FOIA Control No. 88-148. It also filed a motion requesting an extension to file reply comments in this proceeding until one week from the public disclosure of the parties' settlement agreement or until September 23, 1988. PRTA filed an opposition to such motion on September 8, 1988, contending, *inter alia*, that IT&E had not provided sufficient justification to permit it to supplement its comments or to file an additional pleading. On September 9, in a Joint Statement filed by IT&E and PRTA, IT&E withdrew its motion, FOIA request and comments, and urged the Commission to grant PRTA's petition.

[13] Contel ASC, among others, provides interstate private line communications services between Puerto Rico and off-island points jointly with PRTC.

[14] 2 FCC Rcd at 6604-6605.

[15] *Id.* at 6605-6612. Regarding interconnection, the Commission imposed both long-term equal access and interim access requirements on PRTC. The instant Petition does not affect these continuing obligations of PRTC which are the subject of pending Commission review. Nonstructural safeguards imposed on PRTC included utilization of Part 67 cost allocation procedures and disclosure of network and customer proprietary network information (CPNI), the latter under appropriate safeguards, plus disclosure of historical and projected numbers of business and residential telephone lines and average usage per line.

[16] *Id.* at 6618 n. 55.

[17] *Off - Island Services Report and Order*, *supra*, 2 FCC Rcd at 6611. The Commission opined that PRTC would be considered dominant in its provision of domestic off-island services as well. Noting that PRTC proposed unseparated operations and citing the Fifth Report and Order in the *Competitive Carrier Proceeding* and its requirements that interexchange affiliates of LECs maintain separate books of account and not jointly own transmission or switching facilities with the exchange carrier, the Commission observed that "it . . . appears that PRTC would qualify for dominant regulatory treatment under the existing *Competitive Common Carrier* rules." (footnote omitted) *Id.*

[18] 95 FCC 2d 575-76. The Commission's finding was based on a determination that interexchange carriers affiliated with exchange telephone companies lack substantial market power in interstate, domestic, interexchange telecommunications services markets. *Id.* at 557.

[19] *Id.* at 579.

[20] 98 FCC 2d 1199-1200.

[21] *Id.* at 1198.

[22] *Id.*

[23] *Id.*

[24] *Id.* ; *see generally*, Second Computer Inquiry, 77 FCC 2d 384, *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff' d sub nom.* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff' d on second further recon.*, FCC 84-190 (released May 4, 1984).

[25] *Id.* at 98 FCC 2d 1198.

[26] Petition at 2-4. The Petition states that LTLD will be a separate corporation from PRTC and a subsidiary of PRTA. Filings made contemporaneously by PRTC disclose that LTLD, like PRTC, will be owned 100% by PRTA. *See* Amendment to Puerto Rico Telephone Company's Amended Application for Authorization to Construct and Operate an International Earth Station in Humacao, Puerto Rico, File No. CSG-85-048-P (filed August 24, 1988).

[27] *Id.*

[28] Petition at 4.

[29] *Id.* Detariffed services will be obtained from PRTC on an "arms-length, non-discriminatory basis." *Id.* at 4-5.

[30] International Competitive Carrier Policies, CC Docket No. 85-107, 102 FCC 2d 812 (1985), *recon. denied*, FCC 86-339 (released August 7, 1986) (hereafter, *International Competitive Carrier Order*).

[31] *Id.* at 832. In the *International Competitive Carrier Order* the Commission specifically deferred determining whether or not PRTC was dominant to other proceedings. In the *Off - Island Services Report and Order*, *supra*, the Commission determined that PRTC would be treated as dominant where it proposed to provide domestic and international off- island services on an unseparated and fully integrated basis. Unseparated and fully integrated service is not proposed in the instant case.

[32] *Id.*

[33] Id.

[34] AAC&R was renamed AT&T of Puerto Rico, Inc., after AT&T acquired it from ITT Communications Services, Inc., in July of 1987. AAC&R was the traditional provider of IMTS to and from Puerto Rico. The Commission found AAC&R to be dominant in the *International Competitive Carrier Order*, 102 FCC 2d 832.

[35] See, e.g., 77 FCC 2d 461-463.

[36] 98 FCC 2d 1198.

[37] We note that, like PRTC, LTLD is a government-owned, public corporation. See Petition at 9. The Commission has stated that an entity's possession of potential advantages solely as a result of its government-owned status should not preclude its authorization to provide telecommunications services. *Off-Island Services Report and Order*, 2 FCC Rcd at 6613, *citing* Guam Telephone Authority, Memorandum Opinion, Order, Authorization and Certificate, File No. 1-P-C-81-028, Mimeo No. 1990 (released February 5, 1982). The Commission saw no reason to bar entry by PRTC into off-island markets based solely on its government-owned status. The Communications Act provides the Commission with ample authority to investigate, either on complaint or its own motion, conduct that may raise anticompetitive issues. *See, inter alia*, Sections 201-209, 312, 314, 403 and 702(d) of the Act, 47 U.S.C. §§ 201-209, 312, 314, 403 and 602(d). Accordingly, we see no reason to bar LTLD's entry into offshore telecommunications markets merely because it is publicly owned. Instead, any conduct raising anticompetitive concerns can be considered and appropriate action taken in the context of tariff or complaint proceedings.

[38] With regard to its provision of off-island international services, LTLD will be subject to streamlined regulation. As a result, LTLD will be required to furnish its international services pursuant to tariff. 102 FCC 2d at 843-844. As a regulated common carrier, LTLD remains subject to Title II requirements that its rates for both MTS and IMTS are just and reasonable and that service is provided to users on a nondiscriminatory basis. See Sections 201-202 of the Act, 47 U.S.C. §§ 201 and 202.

[39] *See Off-Island Services Report and Order, supra*, 2 FCC Rcd at 6603, 6606-09; *see* also AT&T Acquisition of ITT Communications Services, Inc. Subsidiaries, *supra*, 2 FCC Rcd at 3951.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-140

In the Matter of

Amendment of Part 74 of the	RM-5416
Commission's Rules Concerning FM	RM-5472
Translator Stations	

ORDER DENYING EXTENSION OF TIME

Adopted: September 15, 1988;Released: September 23, 1988

By the Chief, Mass Media Bureau:

1. On September 9, 1988, MHS Holdings, Ltd. (MHS), filed a motion requesting that the time within which to file reply comments to *Notice of Inquiry* in the above-captioned proceeding be extended from September 15, 1988, to October 17, 1988. MHS argues that more time is needed to review the many voluminous initial comments filed and that the importance of the issues addressed require a thoughtful and well-structured reply.

2. The *Notice of Inquiry* provided a 60-day comment period and a 30-day reply comment period. While we recognize that this proceeding raises many important issues, we believe that the time provided for comments and reply comments has been sufficient to permit parties to fully consider such matters and for us to develop a complete record in this proceeding. Thus, we will not extend the filing date for reply comments as requested.

3. Accordingly, IT IS ORDERED that the motion for extension of time filed by MHS Holdings, Ltd., IS DENIED.

4. This action is taken pursuant to authority found in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, and Section 0.281 of the Commission's rules.

5. For further information concerning this proceeding, contact Marcia Glauberman, Mass Media Bureau (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-396

In re

Review of Rules and Policies
Concerning Network Broadcasting
by Television Stations:
Elimination or Modification of
Section 73.658(c) of the
Commission's Rules

NOTICE OF PROPOSED RULE MAKING

Adopted: August 4, 1988; Released: September 23, 1988

By the Commission: Commissioner Dennis issuing a separate statement.

I. INTRODUCTION

1. The Commission hereby proposes to examine the possibility of modifying or eliminating the "term of affiliation" or "two-year rule," 47 CFR §73.658(c), limiting the term of affiliation agreements between networks and stations to a maximum of two years.

2. We feel it is necessary and important to reexamine the two-year rule for two reasons. This rule was adopted nearly a half-century ago for the radio industry and then applied to television, without evaluation or modification, in 1945. Our foremost concern is that the factual predicates underlying the adoption of the rule may no longer be valid in today's television industry and that therefore the rule may no longer assist in the development of new networks. Moreover, we believe the rule may inhibit the ability of broadcast services to withstand competition from new delivery systems.

3. We wish to emphasize that our purpose in instituting this proceeding is not to undertake a sweeping review of our network television rules but rather to examine one specific rule which may no longer be justifiable from a public interest perspective.

II. BACKGROUND

4. *The Chain Broadcasting Report.* Section 73.658(c), the "term of affiliation" rule, was adopted in the 1941 *Report on Chain Broadcasting* and its accompanying *Order*.[1] The "chain broadcasting" rules remain unchanged in substance from that time.[2] A detailed explanation of the genesis and overall conclusions of the *Report* is not necessary for our purposes here. Generally, the rules attempt to limit the network power or influence to which affiliated licensees are subject by proscribing certain restrictive practices or clauses in network affiliation contracts. [3] As our Network Inquiry Special Staff observed in its 1980 report, these regulations "attempt to limit the perceived ability of the major networks to exact from their affiliates contract terms that may also entrench whatever advantages existing networks enjoy over their potential competitors."[4]

5. The *Chain Broadcasting Report* found that NBC (with "Red" and "Blue" networks) and CBS, then the dominant network organizations, prevented their affiliates from broadcasting the programs of any other network through the use of contracted "exclusivity" clauses, and that the standard term of network affiliation contracts was five years -- four years longer than the radio license term of one year then in effect.[5] Moreover, NBC and CBS reserved the right of early cancellation to themselves, possessing the power to terminate the agreement after one year. Affiliates had no such reciprocal clause to permit termination of their network affiliations at a time prior to the expiration of their contracts. The Commission concluded that the clear purpose and effect of both network practices was to "prevent the growth of other national networks." *Chain Broadcasting Report* at 51; *see also id.* at 59 (the purpose of the 5-year term is to prevent the affiliates from becoming affiliated with another national network).

6. The long-term affiliation contracts used by NBC and CBS were found to be especially damaging to the public interest, because the contracts gave no opportunity for the licensee to escape the contract at any time prior to its expiration.[6] The *Chain Broadcasting Report* observed, at 61-62:

> Regardless of any changes that may occur in the economic, political, or social life of the Nation or of the community in which the station is located, CBS and NBC affiliates are bound by contract to continue broadcasting the network programs of only one network for 5 years. The licensee is so bound even though the policy and caliber of programs of the network may deteriorate greatly. The future necessities of the station and of the community are not considered. The station licensee is unable to follow his conception of the public interest until the end of the 5-year period. The option of CBS and NBC to terminate the contract upon a year's notice, without a correlative option in the affiliate, gives the network the whip hand over the outlet. Such an agreement is lacking in mutuality.

The Commission also concluded that limitations of this kind by networks upon their stations prevented further competition and improved programming by the networks, since, without meaningful access by Mutual and various regional networks to many larger programming outlets, all networks had fewer incentives to improve their programming. On this point, the Commission stated, "Competition is in the public interest not because the particular service offered by a new unit is better than the existing service, but because competition is the incentive for both the old and the new to develop better services." *Id.* at 56.

7. In sum, the Commission hoped the "two-year" rule, as well as other chain broadcasting rules, would promote additional competition with the existing networks and thereby spur better programming for the public. It was the Commission's belief that mandating shorter terms of affiliation would lead to more networks and create greater opportunities for any new networks to sign on the affiliates of the major networks once their affiliation agreements expired. A greater number of national networks was

expected, in turn, to result in a larger supply of programming and "a gain in programming quality as well as quantity" as networks competed more equally for stations' time and as the programming of all networks became more readily available to stations in smaller markets. *Id.*

8. *The Barrow Report.* The radio network rules adopted by the Commission in 1941 were applied to television in 1945 without modification in a general Rule Making *Order* which established the first television table of allotments and transposed relevant regulations governing standard and FM radio broadcasting stations to the new medium. 47 CFR §§3.631-3.638 (1946); *Amendment of Part 3 of the Commission's Rules*, 11 Fed. Reg. 33 (January 1, 1946). By the mid-1950's, with the rapid development of commercial television and the changes in radio networking wrought by that development, the Commission desired to determine whether this transfiguration of the broadcast marketplace rendered the network rules to any degree obsolete. Consequently, a special "Network Study Committee" was formed in 1955 with the approval of Congress. The Committee's staff was chaired by Dean Roscoe L. Barrow of the University of Cincinnati Law School. The Committee's final report[7] was the Commission's first revisitation of the network rules since their imposition. As a general matter, the *Barrow Report* preserved the structure of the existing network rules and suggested additional rules further restricting, *inter alia*, network uses of the affiliation contract, option time, and advertising rate decisions to influence licensee behavior. Its conclusions and recommendations were "designed to improve upon the existing structure [of the rules governing network-affiliate contracts] rather than to provide a substitute for it." *Barrow Report* at 665.

9. In its examination of the two-year "term of affiliation" rule, the *Barrow Report* compared the arguments for and against lengthening the maximum permissible affiliation term. A longer affiliation term was urged by some licensees on the grounds that it would provide affiliates with greater security; therefore, it was claimed, affiliates would make more long-term capital investments necessary for programming in the public interest and would feel greater freedom to reject programs from the network with which they were affiliated. Additionally, it was argued that permitting longer affiliation terms would strengthen the bargaining position of affiliates relative to the networks. On the other hand, the study noted that a longer affiliation term would tend to lessen the competitive opportunities for changes in affiliation. As a final matter, the staff considered the merits of requiring, by rule, licensees' affiliation contracts to specify mutual rights of cancellation at a time earlier than the full length of the contract.

10. The *Barrow Report* concluded that retention of the existing two-year limitation on affiliation terms was the most desirable course to follow, as "the greatest opportunity will prevail for competition among networks for affiliates and among stations for competition." *Barrow Report* at 262-63. The Network Study Staff maintained that networks would continue to insist on the contractual flexibility to cancel affiliation contracts at an earlier date even if the maximum permissible term of affiliation was lengthened. However, it did not favor a Commission rule to require affiliation contracts to give affiliates a similar flexibility. The staff declared that if the networks would not voluntarily accept such contract terms,[8] a rule of this kind would require direction and enforcement by the Commission to be effective. The *Report* went on to state that "[a]s a matter of public policy, it does not appear appropriate that the Commission should require, or approve, of such unilateral rights." *Barrow Report* at 262.

11. *Repeal of the Network Rules for Radio.* The continued decline of radio networks as significant forces in the market into the 1970's led the Commission to question whether the network rules should continue to be applied to radio licensees. In our *Report, Statement of Policy, and Order* in Docket No. 20721, 63 FCC 2d 674 (1977)(hereinafter cited as " *Radio Network Report and Order),* we concluded that application of most of the network rules to radio, including that restricting term of affiliation, was no longer necessary due to the vastly changed circumstances surrounding radio networks and their uses by licensees since imposition of the rules in 1941.[9] Specifically, we noted the great increase in the number of aural broadcast stations in the United States, from 660 AM and 25 FM stations in 1941 to over 8,000 in 1977 (approximately 4,475 commercial AM, 2,850 commercial FM and 850 educational FM). Moreover, there were far more broadcast services in each market; 98 of the top 100 markets were found to have more than 10 radio and television outlets, as compared with the *Chain Broadcasting Report*'s finding that of the 92 cities with over 100,000 population, fewer than 50 had three or more full-time radio outlets, and fewer than 30 had four or more. The number of national radio networks had also significantly increased by 1977 to 10 networks operated by five companies; the number of regional and state networks similarly increased.

12. More importantly, we observed that the nature of the service provided by radio networks had changed drastically since the adoption of the chain broadcasting rules. While most radio network service in 1941 was of basically the same kind and duration as television network service today, *i.e.*, network programs of a half-hour or longer, "the bulk of radio network programming (in 1977) is news and informational material, much of it in periodic (e.g., hourly) segments of 5 minutes or less, although ABC, CBS, NBC, and Mutual all have 15-minute or half-hour religious, public affairs and other programs." *Radio Network Report and Order* at 678. We further observed that, while the radio networks also carried other, longer programs, such as late-night dramatic series or all-night talk shows, "[t]hese services are often sold separately from the regular network service and sometimes . . . are carried by stations other than the network's regular affiliate for other programs." *Id.*

13. Finally, and perhaps most significantly, the Commission found that the economic importance of radio networks to their affiliated stations had decreased sharply both when compared with radio in 1941 and with television in 1975. Specifically, national network radio revenues in 1975 were only 3 percent of total radio revenues for that year, as compared with 46 percent in the 1941 radio industry and approximately 41 percent in the 1975 television industry. The Commission further found that radio networking had generally ceased to be a profitable enterprise, "with losses in 7 of the last 8 years . . . ." *Radio Network Report and Order* at 678.

14. Based upon these circumstances, the Commission held that the term of affiliation and other chain broadcasting rules were no longer necessary for radio simply because "the [network] abuses and practices dealt with [in the network rules] are unlikely to develop [in the current radio industry] to any substantial extent." *Id.* at 679.

15. *The 1980 Network Inquiry Report.* The Commission instituted an inquiry into commercial television network practices at approximately the same time as the deletion of the radio network rules. *Notice of Inquiry* in Docket No. 21049, 62 FCC 2d 548 (1977)(hereinafter cited as " *Network Inquiry NOI); see also, Further Notice of Inquiry* in Docket No. 21049, 69 FCC 2d 1549 (1978). We recognized that in the twenty years since the issuance of the *Barrow Report*, the role of the television networks had changed. While the *Report* suggested many far reaching changes in the network rules, with regard to the rule at issue here, the Report concluded that it may have the effect of reducing the anticipated profitability of new networks by imposing extra costs associated with the strictures of network-affiliate contracts. The rule may also bias affiliation choices away from television broadcast stations to outlets employing newer technologies (*e.g.*, cable television), since it applies only to organizations supplying interconnected programming for simultaneous broadcast. The *Report* concluded that "the very appearance of new networks and new broadcast outlets should substantially reduce the concerns which led the Commission to adopt the rules initially," since "[t]he goals of competition, localism and diversity are all served by an expansion in the number of entities participating in the broadcast system." *Id.* at 491. The "appropriate regulatory policy is one that promotes such a result," the staff stated, not one which frustrates it. *Id.*

III. DISCUSSION

16. The term of affiliation rule limits the term of affiliation agreements between networks and stations to a term of two years.[10] As stated in paragraphs 5-7 *supra*, the Commission's initial purpose in adopting the two-year cap on radio network affiliate agreements was to assist the growth of additional national networks. Specifically, the Commission believed that, through various clauses in their affiliation agreements, the then existing radio networks were able to control station behavior and to prevent the entry of competing networks. The Commission regarded the standard five-year network affiliation agreement then in use as particularly harmful in this regard, as its practical effect was to prevent potential competitors from having opportunities to negotiate for affiliation with the stations. Although the Commission never expressly so stated, presumably the same reasoning that led to the adoption of the two-year cap and other network rules for radio led to the 1945 application of the rules to television. We believe, however, that such reasoning may not be valid in today's television industry. We believe that, contrary to the original intent of the two-year cap, the rule may not assist the development of new networks and may, in addition, hamper the competitive abilities of the existing network-affiliate system. Therefore, the limitations of the term of affiliation rule on television networks and affiliates may be unjustified.

17. In 1945, when the two-year affiliation rule was first applied to television, it may have been true that the number of television outlets in each market was so limited that the only way to build a new network was to lure an affiliate away from an existing network. Since that period, however, the marketplace has changed dramatically. First, just in broadcast television, the number of outlets on both a national and local level has markedly increased.[11] The average number of broadcast television stations per market has doubled even since 1980, rising from 3.9 to 8.1. The typical market now boasts not only television stations affiliated with the major networks but also a host of independent stations.[12] Because of this, it may be possible to organize a new network by reaching affiliation agreements with local independent stations.

18. In addition the market place has witnessed a proliferation of alternative video delivery systems, including cable television,[13] video cassette recorders[14] and satellite master television antennas.[15] Some of these distribution systems, such as cable and SMATV, are used to distribute programming nationally and regionally, on a simulcast or same-day basis, in a manner that resembles conventional network distribution. Employed in this way, video delivery systems provide attractive means for entrepreneurs to develop competing "networks" without relying on aggregating a group of affiliated broadcast stations. Thus, the established networks face vigorous competition for viewers and advertisers not just from new broadcast networks but also from these emerging "networks" employing other technologies. In recent years, there has been an audience shift from the three major networks to these other "networks."[16]

19. Deletion of the rule may serve to strengthen the network-affiliate system, making it better able to withstand competition by these new delivery systems. While the term of affiliation rule seems predicated on the idea that long term contracts are chiefly an anticompetitive device by which the networks can guard against the raiding of their affiliates, we must recognize that long term contracts can serve other perfectly legitimate business purposes. For instance, longer term contracts may facilitate extended financial planning by both existing and new networks, who could use such contracts to maintain or organize a stable system of affiliates. With this kind of solid financial base, the new networks might find it easier to attract capital for ventures, plan their programming schedules, and consider longer range expansion of their system of affiliates. Thus, by banning contracts longer than two years, the term of affiliation rule may have had the unintended effect of hindering the competitive ability of all networks.

20. Further, it is arguable that fledgling stations or stations whose operations are currently marginal might also benefit from elimination of the existing two-year rule. A long-term affiliation agreement guaranteeing them a steady supply of future programming could make it easier to obtain the financial backing necessary to construct or improve facilities and to attract advertisers. In contrast, the present rule severely limits an affiliate's financial and other planning.[17] Indeed, long-term affiliations might be more profitable for all stations, since networks, anxious to reap the benefits of a long-term relationship themselves, might willingly pay a premium for the extended contract term.

21. In sum, we believe that the term of affiliation rule may no longer serve any useful purpose and that permitting networks and affiliates to bargain freely for longer terms of affiliation than are currently permitted under our rules might actually promote the economic health and growth of networks and their affiliated stations, thereby strengthening the network-affiliate system as a whole. We believe the stability of a long-term relationship could, among other benefits, offer the parties an easier opportunity to obtain financial backing, attract advertisers and in general, help successfully plan for future development.[18]

22. For these reasons, we tentatively favor elimination of the term of affiliation rule and ask interested parties to comment on the impact of the proposed action both on networks and stations. We also ask parties to comment on whether modification of the rule would be preferable to complete elimination and, if so, what modifications might be appropriate. One possible modification, for example, might be to extend the permissible term of affiliation to a period of five years to correspond with the current television license term.[19]

IV. ADMINISTRATIVE MATTERS

23. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

24. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide, on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or other filings in the proceeding, must provide, on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

25. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is attached hereto as Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

26. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

27. Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **November 14, 1988,** and reply comments on or before **November 29, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (room 239) of the Federal Communications Commission, 1919 M Street, N.W. 20554.

28. Authority for this proposed Rule Making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended.

29. Further information on this proceeding may be obtained by contacting Linda Blair, Legal Branch, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

I. Reason for the Action:

This proceeding is initiated to determine whether the "term of affiliation" or "two-year rule," limiting the term of affiliation agreements between television networks and stations, should be eliminated, modified, or retained in its present format. The Commission feels it is important to look at the "two-year rule" for two reasons. First, the rule is nearly a half- century old and has not been reevaluated or modified since 1945. We believe the factual predicates underlying the adoption of the rule may no longer be valid in today's television industry and that therefore the rule may no longer assist in the development of new networks. Moreover, we believe the rule may inhibit the ability of the broadcast services to withstand competition from new delivery systems. Second, we believe that the rule, contrary to its initial purpose, may actually inhibit the growth of new networks and stations.

II. Objective of this Action:

The action is intended to review one specific network television rule to examine its applicability to the modern television industry and determine whether it still serves the public interest. Through this review, the Commission hopes to adjust the network television "two-year rule" so that broadcasters will have maximum flexibility in providing service most in the public interest.

III. Legal Basis:

Authority for this proposed rule change may be found in 47 U.S.C. 154 and 303.

IV. Number and Type of Small Entities Affected by the Proposed Rule:

Many television licensees, including those that are now network affiliates and those that might become network affiliates in the future, would be affected by the proposed elimination or modification of the two-year rule. Of these licensees, many are small business entities under the Regulatory Flexibility Act. If the two-year rule is amended to permit longer term contracts, licensees that enter into extended network affiliation agreements may find that the guarantee of a steady supply of future programming makes it easier to obtain financial backing necessary to construct or improve facilities and easier to attract advertisers. Networks may also be willing to pay the licensees a premium for extended contract terms.

V. Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:

The Commission is proposing elimination of the current "two-year rule," which would reduce, rather than impose, such compliance requirements.

VI. Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:

No existing rules would overlap, duplicate, or conflict with the proposed rule amendment.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:

This *Notice of Proposed Rule Making* suggests elimination of a rule, offering small entities the most flexibility possible consistent with the public interest.

FOOTNOTES

[1] *Report on Chain Broadcasting* and *Order* in Docket No. 5060 (May 2, 1941), (hereinafter cited as " *Chain Broadcasting Report), aff'd sub nom. National Broadcasting Company v. United States*, 319 U.S. 190 (1943).

[2] The "network" or "chain broadcasting" rules were codified originally at 47 CFR 3.101-3.108 (1941), and in addition to the "two-year" rule, included, *inter alia*, the exclusive affiliation rule, rules on dual network operation and territorial exclusivity, and the original version of the "duopoly" rule. The rules are now found at 47 CFR §73.658 (1986); the "duopoly" rule is set forth with the other multiple ownership rules at 47 CFR §73.3555 (1986).

[3] The *Chain Broadcasting* Report, in defining the term "network organization", relied on the definition of "chain broadcasting" found in Section 3(p) of the Communications Act, 47 U.S.C. §153(p), as "simultaneous broadcasting of an identical program by two or more interconnected stations." Chain Broadcasting Report at 3. The Report further announced that all national or regional networks would be included in this definition. The definition continues to apply to the term "network organization" as used in the term of affiliation rule.

[4] Federal Communications Commission, Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report (Vol.I) at 445 (October 1980)(hereinafter cited as "Network Inquiry Report").

[5] Section 307(c) of the Act at that time permitted a maximum license term of three years; however, the Commission licensed standard broadcast stations for only one year. 47 CFR §3.34 (1940). The Commission amended the license term to two years on October 14, 1941. The radio license term is now seven years. *See* §73.1020 of the Commission's Rules; 47 U.S.C. § 307(c)(1982).

[6] Mutual's contracts with its affiliates at that time permitted either party to cancel after the first year, with a year's notice.

[7] Network Study Staff, Network Broadcasting, FCC, 1957 (reprinted as H. Rep. No. 1297, 85th Cong. 2d Sess., 1958) (hereinafter cited as "Barrow Report"). All citations herein are to the Congressional reprint.

[8] The Barrow Report noted, at 262, n.79, that of the three networks, only CBS' affiliation contract provided for mutual cancellation by network or affiliate, and only since 1956, the year before release of the Report.

[9] The "territorial exclusivity" rule, originally 47 CFR §3.102(1941), was retained. It is now set forth at 47 CFR §73.132 (AM), 47 CFR §73.232 (FM), and 47 CFR §73.658(b)(TV). As this rule is beyond the scope of the present proceeding, it will not be discussed further.

[10] The term "network" in this rule, as in many of the "chain broadcasting" rules, refers to all electronically interconnecting over-the-air networks, whatever their size. *See* footnotes 2 and 3 *supra*. Thus, today the rule technically may apply to syndicators that distribute shows to numerous stations by satellite for simultaneous broadcast, even though obviously such application was not comtemplated when the Commission applied the rule to television in 1945.

[11] Today, the total number of authorized stations -- *i.e.*, those that are licensed, on-air, or under construction -- is 1766. Seventy-one percent of the Nation's television households can receive nine or more television signals off-air.

[12] The number of independent television stations has increased far more dramatically than the number of network-affiliated stations. For example, in 1970, there were 600 network-affiliated stations and 90 independents; however by 1988, while the number of commercial television network affiliates increased only to 661, the number of independents increased by 247 percent, to a total of 313.

[13] From 1955 to the present, the number of cable television systems has increased from 400 to over 8,000. The number of subscribers has increased from 150,000 to 45 million. Even since 1980 there has been a dramatic increase in the number of cable television systems from 4,225 to 8,000 and the number of subscribers from 15.2 million to 45 million. All projections are for the cable television industry to continue growing, with a penetration rate of 52.2 percent projected by 1989. *See* National Telecommunications and Information Administration Report 88-233, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations (1988); The Kagan Media Index, Paul Kagan Associates, Inc., May 17, 1988 at 2.

[14] The percentage of television households with VCRs has increased to 54.7 percent as of April 29, 1988, and has jumped from 40 million households in 1987 to 48.63 million in 1988, an increase of more than 20 percent. The Kagan Media Index at 2.

[15] There are currently about 680,000 subscribers to satellite master antenna television systems (SMATVs) built in individual apartment complexes, condominiums, and hotels. The number of SMATV subscribers increased by 14 percent from August 1986, to August 1987. It is projected that the number of SMATV subscribers will increase by 9 percent this year. *The Kagan Media Index* at 2.

[16] The three major networks' prime time audience share has dropped from 91% in 1977 to 67% in 1987. Nielson Television Index, 1977 and 1987.

[17] *See Memorandum Opinion and Order: WBC Associates*, L.P., 2 FCC Rcd 6083 (1987).

[18] We would be interested in information concerning whether elimination of the two-year rule for radio has typically resulted in changes in term of contract, and, if so, what impact such changes have had.

[19] 47 CFR §73.1020. As explained in paragraph 5 *supra*, the two-year limit on terms of affiliation corresponded to the two-year license term for radio in effect when the Chain Broadcasting Report was issued. However the two-year term has never had any particular relevance to television licensees.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Amendment of Part 73, Subpart E, Section 73.658(c) of Commission's Rules and Regulations concerning the Two-Year Limitation of the Term of Network-Affiliate Contracts.

The two-year rule was adopted in 1941. That makes it older than the ABC Network, older than television, even older than Kareem-Abdul-Jabbar. It would be nice to say that the rule has stood the test of time, but the fact is that we haven't really reexamined it since 1957. At this point, it is very difficult even to to be sure who we are helping with this rule. In a market with one VHF channel and 2 U's, the network dealing with the VHF station might want to lock in a long contract. In other markets, the affiliate might want the security of a long-term agreement. In all markets, the length of a contract is just one of many ingredients that goes into the complex relationship between networks and affiliates.

I think this is a good time to reexamine the underlying premise of the two-year rule. I will look forward to comments from small networks as well as big, from individual affiliates as well as the organized affiliate groups, and, of course, from the public.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-376

In the matter of

Amendment of the Commission's Rules to improve the quality of the AM Broadcast Service by reducing adjacent channel interference and by eliminating restrictions pertaining to the protected daytime contour.	RM-5532 RM-6174

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1988; Released: September 12, 1988

By the Commission:

INTRODUCTION

1. The Commission has under consideration comments and reply comments in response to the *Notice of Inquiry* (*Inquiry*) in MM Docket No. 87-267, which solicited comments on a comprehensive review of the technical assignment principles currently applicable to AM broadcasting.[1] This review was prompted by comments filed in response to the Mass Media Bureau's 1986 *Report on the Status of the AM Broadcast Rules* (*Report*) which noted a consistent decline in public satisfaction with the quality of AM broadcast service in recent years, largely because of deficiencies related to its current technical limitations.[2] Based upon the information developed in the *Inquiry*, we intend to explore, in successive and separate rule making proceedings, a wide variety of technical and policy issues and related rule amendments that we believe will enable AM broadcasters to compete more effectively in the audio service delivery marketplace.

2. This particular *Notice* will address two technical proposals mentioned in the *Inquiry* that we believe can effect near-term improvement in the AM broadcasting service: 1) the adoption of a new emission limitation and possibly a new audio processing standard, both of which are intended to reduce the level of adjacent channel interference, thereby encouraging the development of better quality AM receivers; and, 2) elimination of the restrictions currently contained in Section 73.37(b) concerning daytime contour protection, to allow some stations to use additional power.

BACKGROUND

3. Our *Inquiry* addressed a wide variety of fundamental but nevertheless complex assignment criteria used in the AM radio service. For example, it included a review of the suitability of the current signal strength values which define the protected contours (or service areas) of AM stations, as well as consideration of the minimum usable signal strength as a function of listener preference, atmospheric and man-made noise, and receiver design. It discussed the equally important co-channel and adjacent channel signal ratios that constitute the basic tradeoff in the AM service between the quality of received signals and the quantity of stations authorized. In addition, it invited comments on a new proposal to permit AM broadcasters to enter into mutual agreements concerning the degree of interference protection to be afforded in specific cases, as well as approval for the use of new, internationally developed AM service propagation curves.

4. Other potentially less complex issues included discussion of the suitability of the current AM emission limitations, audio signal processing practices and the method of determining the cumulative interference resulting from the reception of multiple signals. We also solicited comment on the desirability of amending Section 73.37(b) of the Rules to permit AM station licensees to increase their transmitter output power provided that no additional interference would be caused to co-channel or adjacent channel licensees, and notwithstanding the fact that interference from other stations would be caused to areas within the expanded service area. The intent of this change was not necessarily to increase the size of the original service area (although some expansion is possible), but rather to increase the signal level within the original service area, thereby improving the quality of service in areas normally subject to protection from interference.

5. On November 6, 1987 (subsequent to issuance of the *Inquiry*), the Commission received a petition (RM-6174) from the National Association of Broadcasters (NAB) requesting formal adoption of an AM transmitter audio standard developed by the National Radio Systems Committee (NRSC).[3] Because the NRSC standard is intended to reduce adjacent channel interference by requiring substantial attenuation of audio signals above 10 kHz, and by limiting the maximum amount of audio pre-emphasis below 10 kHz, it will be considered in connection with a new emission limitation proposed herein, with which it is closely related.

DISCUSSION

6. Since thorough analysis of the many comments filed in response to the *Notice of Inquiry* is expected to be a time-consuming process, we propose early treatment of the less complicated issues in order that improvement in the quality of AM service can be achieved without unnecessary delay. Accordingly, we will address the radio frequency (RF) emission limitations (including the NRSC audio standard recommended by NAB), as a means of reducing adjacent channel interference, and address whether Section 73.37(b) should be amended to generally permit received overlap[4] to occur where requisite protection is provided to other stations. These matters are discussed at length below.

REVISION OF THE EMISSION LIMITATIONS

7. The existing AM service transmission system emission limitations are set forth in Section 73.44 of the Rules.[5] Basically, they permit an AM broadcaster to transmit an unattenuated audio signal between 0 and 15 kHz. However, the best possible AM performance is seldom ever

approached in practice for many reasons, one of which is the narrow receiver bandwidth that is necessary because frequency assignments in the AM service are made in 10 kHz increments throughout the band.[6] This can result in situations (particularly at night, when reception of very distant stations is common) where the emissions of adjacent channel stations overlap each other substantially. Partial sideband overlap during daytime groundwave service also can occur in the case of stations separated in frequency by 20 kHz (second adjacent channel stations). Thus, a desired station's sideband emissions are susceptible to being contaminated by signals of first and second adjacent channel stations.

8. To limit the interference caused by these overlapping sidebands, the Commission developed various co-channel and adjacent channel signal protection ratios that essentially define both the quantity (i.e., the number of stations) and the quality of AM service.[7] These ratios ensure that the signal of any particular AM station is substantially stronger (in its service area) than the signals of the other stations. However, in order to provide for diversity in what was then effectively the sole aural service, the Commission was compelled to limit the interference protection afforded individual stations in order to be able to authorize a greater number of stations. As a result, AM receivers must cope with adjacent channel interference levels that effectively preclude reception of high fidelity AM service.[8]

9. In order to reduce the effects of permissible levels of adjacent channel interference, AM receiver manufacturers generally have designed receivers with substantially restricted radio frequency (RF) and intermediate frequency (IF) bandwidths. This typically results in an upper limit receiver audio frequency response of 3 kHz to 5 kHz.[9] In an attempt to overcome this limitation, AM broadcasters often try to "brighten" their sound by boosting the higher audio frequencies. This improves fidelity somewhat, but not nearly enough to overcome the effect of the narrow receiver bandwidth. Moreover, boosting the higher audio frequencies can exacerbate adjacent channel interference.

10. Other audio processing techniques are used by broadcasters to improve the apparent receiver signal-to-noise (or signal-to-interference) ratio. For example, dynamic compression techniques increase the average signal-to-noise ratio. Audio "limiters" and "clippers" are used to reduce high amplitude audio transients that could cause overmodulation. In doing this, such devices also increase the average loudness of the program material by reducing its dynamic range.[10] The penalty paid for this increase in loudness is increased (albeit unobjectionable) program distortion and the generation of additional higher order sidebands that, like the "boosting" described above, can increase adjacent channel interference levels.

11. To break this vicious circle, broadcasters have concluded that fundamental changes are necessary in the AM transmission standards. As an initial effort, NAB has petitioned the Commission to adopt new rules that would mandate use of the NRSC audio standard by AM stations in order to effectively limit their occupied bandwidth to 20 kHz (this would permit a 10 kHz audio baseband). We concur with NAB in concluding that widespread use of the NRSC audio standard would constitute an important step toward reducing adjacent channel interference. Also, most of the comments filed in response to the NAB petition agree that reduced adjacent channel interference in the AM service would encourage the design and introduction of wider bandwidth receivers with substantially improved fidelity compared to current models. Such an improvement in fidelity, they argue, would make the AM service more competitive with the FM broadcast service.

12. The rules recommended by NAB are based on one of two voluntary standards developed by the NRSC to reduce adjacent channel interference: One recommended NRSC standard would define the characteristics of the audio signals fed to the input of a transmitter. The other would define the characteristics of the radio frequency signal emitted by the transmission system. NAB recommends the FCC mandate compliance with the NRSC input standard. It has two parts. One would limit the maximum audio frequency at the transmitter input to 10 kHz so as to limit the potential for adjacent channel interference. The other part would limit the maximum amount of pre-emphasis[11] that can be applied to audio signals below 10 kHz in order to set a limit on the amount of interference that may be caused to first adjacent channel stations.[12] The reduction in adjacent channel interference is expected to encourage the production of receivers employing a standard de-emphasis which in turn would lead to better reception. Although about 15% of AM licensees have already adopted the NRSC audio standard voluntarily, NAB, nevertheless, requests that the Commission mandate its use beginning January 1, 1990. This, NAB argues, will give receiver manufacturers an incentive to promptly design and market the better quality receivers made possible by the reduction in adjacent channel interference and universal use of a specific audio pre-emphasis characteristic.

13. We agree that if the NRSC audio pre-emphasis is used at an otherwise properly adjusted and operating station, adjacent channel interference should be substantially reduced because the NRSC audio pre-emphasis standard would effectively limit the highest permissible audio frequency to just under 10 kHz. Frequencies above this limit would be substantially attenuated[13] and sideband components outside the 20 kHz bandwidth channel would be reduced, thereby alleviating the second (and higher) adjacent channel interference potential. Use of the NRSC pre-emphasis characteristic may also aid receiver manufacturers in designing better receivers since it would provide them with an augmented upper-end frequency response that could be de-emphasized either through a specific de-emphasis filter, or by new receiver selectivity characteristics. Such pre- emphasis could even benefit reception on current receivers to a limited extent, since upper mid-range frequencies would also be given some pre- emphasis. Thus, it appears that broadcasters have a number of natural incentives to comply with the NRSC pre-emphasis standard.[14]

14. However, the goal of reduced adjacent channel interference may be only partially met through use of the NRSC pre-emphasis standard alone. While in theory (i.e., in a properly adjusted and perfectly functioning broadcast system) this would control emissions within and emissions outside a 20 kHz bandwidth, several factors associated with audio, transmitter and antenna system performance can increase radiated emissions beyond the desired limit.

15. For example, effective use of the NRSC audio pre-emphasis as a means of reducing first adjacent channel interference appears to based on the assumption that no initial pre-emphasis of signals above 5 kHz is applied by equipment located before the NRSC filter in the audio line. However, this may not always be the case. Also,

some transmitters contain clipping or limiting circuits that are intended to prevent overmodulation. Any clipping or limiting done to the audio after it is passed through the NRSC filter could introduce harmonic baseband signal components that could circumvent, to some degree, the benefits intended to result from the filter's use. Also, improper transmitter tuning may produce incidental phase modulation with excessive bandwidth.

16. Moreover, compliance with the NRSC audio standard does not preclude problems arising from overmodulation. As Harrison J. Klein, a professional AM consulting engineer, notes: " . . . overmodulation is one of the basic mechanisms by which an amplitude modulated carrier can be degraded. On the surface, overmodulation appears a straightforward phenomenon which should be easily understood and prevented. Yet many stations overmodulate, some intentionally, implying that overmodulation mechanisms are not fully understood or that the stations do not believe there are benefits to preventing overmodulation. On the other hand, receiver manufacturers consider overmodulation a significant AM problem. In numerous industry meetings they have indicated their belief that *splatter caused by overmodulation is a major factor preventing the manufacture of improved, high - fidelity AM radios.* "[15] [Emphasis in original]

17. It is therefore our tentative view that greater attention should be given to the radiated emissions that directly cause interference to other stations than to the characteristics of the audio signals fed to transmitter. Audio processing pursuant to the NRSC standard alone cannot ensure the absence of interference. To be guaranteed effective, the NRSC audio standard would need to be supplemented by additional rules concerning transmitter distortion limits. The current record is deficient with respect to proposals in these areas. Moreover, input standards are of the "how-to" variety that the Commission has consistently striven to eliminate over the years, because they potentially limit licensees' flexibility in achieving compliance in the least cost way and reduce their ability to implement new technology quickly and to respond to changing circumstances in the communications marketplace.

18. At this point in time, it appears that the better alternative is adoption of the NRSC's recently developed emission limitation standard.[16] This standard defines an RF emission mask that would effectively restrict the emissions from an AM broadcast transmitter to a 20 kHz bandwidth channel.[17] Emissions outside the channel would be attenuated to the point where their levels would not cause significant adjacent channel interference.[18]

19. Moreover, relying on emission limitations to control interference would obviate complex rules addressing modulation and transmission parameter limits that imposing the NRSC audio processing standard as a means of reducing adjacent channel interference would entail. Excessive bandwidth resulting from overmodulation also would be limited.[19] Enforcement of emission limitations might also be more easily accomplished, since our enforcement personnel could monitor off-the-air signals of AM stations and determine compliance without the need for a physical inspection of the transmitter facilities.[20] Such a standard is also more consistent with our efforts at technical deregulation, and could therefore better maximize efficiencies in the rendition of aural service, potentially improve the quality of programming and more effectively ensure the development of receivers better able to satisfy public quality concerns. This course of action would not only provide the benefit sought by NAB, but would be compatible with voluntary use of the NRSC audio standard.[21]

20. In spite of the many arguments in favor of adopting the NRSC emission limitation in lieu of its audio standard, concerns have been expressed that implementation and compliance costs associated with the former may be greater than the latter. The allegation has also been made that adoption of the audio standard would do more to reduce first adjacent channel interference.

21. At this juncture, we can find little evidence to support these contentions. Inasmuch as licensees are already responsible for assuring compliance with the emission standards, it is unclear how alteration of these standards would affect compliance cost. Furthermore, test equipment would undoubtedly be required to install and maintain the equipment needed to comply with the audio standard. Therefore, compliance costs under either an emission or an audio standard appear to be roughly equivalent. We therefore seek comment on the cost of complying with either the emission or the audio standard. We also request information as to whether differences in compliance cost between the two standards may be disproportionately large for certain categories of stations.

22. It is also difficult, at this point, to assess either standard's effect on adjacent channel interference because little information is known about the current audio pre-emphasis practices of AM broadcasters. The limits on amplitudes of frequencies above 10 kHz imposed by the NRSC audio standard are substantial and would clearly help in the reduction of adjacent channel interference generally. However, adherence to the NRSC emission limitation should be just as effective. It is true that below 10 kHz, the emission standard imposes no limits, whereas the audio standard appears to impose an absolute limit of 10 dB pre-emphasis of frequencies between 9 and 10 kHz. This may or may not be less than what broadcasters currently use. Also, we seek comments confirming that broadcasters perceive the NRSC audio pre-emphasis characteristic as an absolute audio frequency response limit, rather than merely as a post-audio processing signal adjustment, and identifying any other regulations (e.g., frequency response limits applicable to equipment preceding the NRSC filter in the audio line) that may be necessary to ensure this result.

23. On the basis of the record to date, we tentatively conclude that revision of our emission limitations is the most effective way to reduce adjacent channel interference and encourage production of higher quality receivers. Accordingly, we propose to modify Section 73.44 by adopting new emission limitations based on the NRSC draft *Emission limitation for AM broadcast transmission* (June 17, 1988).[22] The proposed rules also include certain measurement instrument parameters as suggested by the NRSC (e.g., spectrum analyzer resolution bandwidth, filtering, and hold time) in order to eliminate any ambiguity about proper measurement procedure. However, we propose that licensees be permitted to determine compliance with the NRSC emission limitation with any appropriate measurement device, provided that any dispute over measurement accuracy be resolved in favor of measurements provided by a properly calibrated swept frequency spectrum analyzer.

24. Our tentative conclusions on this matter notwithstanding, as a result of information submitted responding to the discussion in paragraphs 14 through 23, *supra*, may

lead us to conclude that, at least for some stations, a more favorable public interest benefit cost comparison would result if a greater reliance were placed on the NRSC audio standard than on the emission standard. Therefore, commenters are also asked to assess the advantages and disadvantages of modifying the proposed emission limitation standard to establish a presumption that stations complying with the NRSC audio standard are also in compliance with the emission standard. We envision that under this approach the finding of presumptive compliance could be rebutted by evidence of interference to adjacent channel operations which is attributable to noncompliance with the *emission* standard.

ELIMINATION OF THE RESTRICTIONS CONTAINED IN SECTION 73.37 (b)

25. Section 73.37(a) of the Commission's Rules specifies the necessary desired-to-undesired signal contour ratios applicable to the various classes of AM stations. More particularly, it proscribes overlap of the 0.5 mV/m daytime contour of a new station by the 0.025 mV/m contour of any other co-channel station. Section 73.37(b) provides for an exception to this rule in cases where the new station would be the first AM broadcast facility in a community located outside of an urbanized area, or the first AM broadcast facility in a community of 25,000 or more population wholly or partly within an urbanized area, or when the facilities would provide the first primary service to at least 25% of the interference-free area within the proposed 0.5 mV/m contour. However, the proposed new station must meet the requirements of Section 73.37(a) in all other respects, and no overlap may occur between the the 1 mV/m contour of the proposed station and the 0.05 mV/m contour of any other co-channel station.

26. All but Class I (clear channel) AM stations are afforded 26 dB co-channel protection to their 0.5 mV/m daytime contours. The effect of Section 73.37(b) is to fully protect the 0.5 mV/m contours of existing stations, but to permit assignment of new stations based on protection of the 1 mV/m contour. Interference between the two contours has been considered acceptable, since a substantial amount of new service would still be afforded the public.

27. It is conceivable that if applicants or licensees were free to *accept* a greater amount of interference than the rules now permit (while continuing to provide full protection to other stations), service to the public could be improved significantly. For example, the power of some stations currently not operating pursuant to Section 73.37(b) could be increased if they choose to afford the 26 dB protection to their 1 mV/m contours rather than their 0.5 mV/m contours. (They would be expected to continue to protect the 0.5 mV/m contours of other co-channel stations.) While interference would be accepted in some of the "expanded" service area that would normally be expected to result from the power increase, received signal levels would still be increased throughout the original service area.[23] Thus, the additional power could be useful in overcoming the effects of natural and man-made noise, and signal attenuation within larger (metallic) buildings.

28. We wish to emphasize that any power increase made possible as a result of eliminating the restrictions in Section 73.37(b) would be possible only if the 0.5 mV/m contours of other co-channel stations continue to be afforded the 26 dB protection currently provided for in the rules. Stations that could be affected by this rule change are those that currently are receiving more than 26 dB protection. Such protection, however, is the result of fortuitous circumstances rather than by design. The listeners at or outside of these stations' 0.5 mV/m contours are likely to be few. Any marginal service such listeners currently receive must be weighed against the improved service that would be afforded to the many listeners within the service areas of the station applying for the power increase. We believe the latter is more important and it is the fundamental assumption underlying our proposal. We solicit additional comment on whether this assumption is correct, since the comments filed in response to the *Notice of Inquiry* on this matter were divided.

29. NAB, for example, opposed any action that would increase interference levels in the AM service. It expressed the view that permitting increased interference would make a mockery of the Commission's technical standards, and that by permitting interference beyond that currently provided by the technical standards would encourage the manufacture of receivers designed for a commensurately lower quality, higher interference environment. NAB also expressed the view that individual broadcasters should not be given the right to make a decision to accept additional interference, since their decision would affect other licensees who would suffer from the institutionalization of a lower standard of quality.

30. However, GSM Media Corporation (GSM) disagreed with this view. It noted that the extra power would enable AM service to better penetrate buildings and overcome atmospheric and man-made noise. Hence, populated areas near the station would gain improved reception. GSM also expressed the belief that relaxation of Section 73.37(b) could allow stations to maintain more stable radiation patterns, since many stations now have highly suppressed patterns designed to prevent now-forbidden overlaps between the station's protected contour and another station's interfering contour. GSM also supported the Commission's view that while a new area of predicted interference would be created, it would occur in areas not previously served, and that there would be a net gain in interference-free service area. Lastly, GSM proposed that Section 73.37(b) be modified to allow licensees, by mutual agreement, to increase radiation toward each other by accepting interference up to their 1.0 mV/m contours, but without causing interference to existing service areas.[24]

31. After reviewing these and other arguments submitted in response to the *Notice of Inquiry*, it is our tentative belief that significant benefits for AM licensees and their listeners could result from giving applicants for new and modified facilities some latitude as to the amount of interference they would receive in the new or expanded portion of their proposed service areas, so long as interference is not increased for other stations.[25] Accordingly, we propose to amend Section 73.37(b) as set forth in Appendix A to generally permit licensees to seek an increase in station power, provided: that the 0.5 mV/m contours of other co-channel facilities, and the relevant contours of adjacent channel facilities, would continue to be protected in accordance with the requirements of Section 73.37(a); and that the 1.0 mV/m contour of the proposed facility is not overlapped by the 0.05 mV/m contour of any other co-channel authorized facility.[26]

32. The rule changes proposed herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, and/or record keeping, labeling,

disclosure, or record retention requirements; and will not increase or decrease the burden hours imposed on the public.

COMMENT PROCEDURE

33. Under procedures set out in Section 1.415 of the rules and regulations, 47 CFR §1.415, interested persons may file comments on or before **November 22, 1988** and reply comments on or before **December 22, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in *Report and Order*.

34. In accordance with the provisions of Section 1.419 of the Rules and Regulations, 47 CFR §1.419, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

EX PARTE CONSIDERATIONS

35. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See* , *generally*, Section 1.1206(a) of the Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or, (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. During the Sunshine Agenda period, no presentation, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence, or the resolution of issues in the proceeding (see Section 1.1203).

36. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which: (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* Section 1.1202(b) of the Commission's Rules. Any person who submits a written *ex parte* presentation must provide on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously filed written comments, memoranda or filings in the proceeding, must provide on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and statements. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates (see Section 1.1206).

ORDERING CLAUSE

37. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IFRA) of the expected impact on small entities of the proposals advanced herein. Written public comments are requested on the IFRA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The copy shall order that a copy of the *Notice*, including the initial regulatory flexibility analysis, be sent to the Chief Counsel for Advocacy of the Small Business Administration, as required by Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

38. Further information on this matter may be obtained from Hank VanDeursen, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

47 CFR 73 is proposed for modification as follows:

1. In Section 73.37, subparagraph (b) would be amended to read as follows:

Section 73. 37 Applications for broadcast facilities, showing required.

* * * * *

(b) An application for a new daytime station or a change in the daytime facilities of an existing station may be granted notwithstanding overlap of the proposed 0.5 mV/m contour by the 0.025 mV/m contour of another co-channel station, provided that:

(1) * * *

(2) * * *

* * * * *

2. Section 73.44 would be replaced in its entirely to read as follows:

Section 74. 44 Emission Limitations.

Effective January 1, 1990, the emissions of stations in the AM service shall be attenuated in accordance with the requirements specified in subsection (a) of this Section. Emissions shall be measured using a suitable swept-frequency RF spectrum analyzer using a 300 Hz resolution bandwidth, a peak hold duration of 10 minutes. and no video filtering. Alternatively, other specialized receivers or monitors with appropriate characteristics may be used to determine compliance with the provisions of this section; provided that any disputes over measurement accuracy are resolved in favor of measurements obtained by using a calibrated spectrum analyzer adjusted as set forth above.

(a) Emissions 10 kHz to 20 kHz removed from the carrier must attenuated at least 25 dB below the carrier level, emissions 20 kHz to 30 kHz removed from the carrier must attenuated at least 35 dB below the carrier level, emissions 30 kHz to 60 kHz removed from the carrier must attenuated at least [5 + 1 dB/kHz] below carrier level, emissions between 60 kHz and 75 kHz of the carrier frequency are attenuated at least 65 dB below carrier level, and emissions removed by more than 75 kHz must be attenuated at least 80 dB below carrier level.

APPENDIX B

Summary of proposed technical parameters

Current emission limitations

(Attenuation below carrier):

Carrier to 15 kHz:	0 dB
15 kHz to 30 kHz:	-25 dB
20 kHz to 75 kHz:	-35 dB
more than 75 kHz:	-[43 + 10 Log P] dB or -80 dB (lesser attenuation)

Proposed emission limitations :
(Attenuation below carrier):

Carrier to 10 kHz:	0 dB
10 kHz to 20 kHz:	-25 dB
20 kHz to 30 kHz:	-35 dB
30 kHz to 60 kHz:	-[5dB + 1 dB/kHz] (see Note 1)
65 kHz to 75 kHz:	-70 dB
more than 75 kHz:	-80 dB

Note 1: (*e.g.*, -40 dB at ± 35 kHz, -70 dB at ± 65 kHz)

Proposed audio standard :

(Attenuation below 1 dB above 90% modulation):

10.0 kHz to 10.5 kHz:	-[15 + 30 unit/kHz] dB (see Note 2)
10.5 kHz to 11.0 kHz:	-30 dB
11.0 kHz to 15.0 kHz:	-[40 + 2.5 unit/kHz] dB
above 15 kHz:	(see Note 3)-50 dB

Note 2: unit = displacement from 0 (in kHz) minus 10 kHz

Note 3: unit = displacement from 0 (in kHz) minus 11 kHz

Maximum pre-emphasis

+10 dB at 10 kHz (referenced to 0 dB at 0 kHz)

Single zero curve with break frequency = 2122 Hz pre-emphasis and single pole with break frequency = 8700 Hz de-emphasis.

APPENDIX C

Initial Regulatory Flexibility Act Analysis

I. ***Reason for Action***

The proposed action is intended to alleviate technical shortcomings characteristic of the AM broadcast service in an effort to make it more competitive with alternative audio delivery services (principally, the FM radio service).

II. ***Objectives***

The objectives of this proceeding are to adopt a new emission limitation that is intended to reduce the second and third adjacent channel interference to AM broadcast stations, and to relax rules prohibiting overlap of the 0.5 mV/m AM station daytime signal contour, provided that no additional interference would be caused to other stations.

III. ***Legal Basis***

The action taken by this *Notice* is authorized by Sections 4(i) and (j), 302, 303 and 403 of the Communications Act of 1934, as amended.

IV. ***Description, Potential Impact and Number of Small Entities Affected***

The action proposed in this proceeding would benefit nearly 5,000 AM broadcast station licensees by reducing second and third adjacent channel interference. The cost of modifying transmitters to comply with the new emission standard may be on the order of several hundred dollars per station. Costs associated with an increase in station power are unknown, but would be incurred entirely on a voluntary basis.

V. ***Recording, Record Keeping and Other Compliance Requirements***

None.

VI. ***Federal Rules which Overlap, Duplicate or Conflict with this Rule***

None.

VII. ***Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objectives***

None.

FOOTNOTES

[1] *See Notice of Inquiry*, FCC 87-245, (52 Fed. Reg. 31795, August 24, 1987). In a subsequent *Order* (52 Fed. Reg. 48844, December 28, 1987), reference was made to the various sections of the *Notice of Inquiry* and comment and reply comment deadlines were set for each as follows:

Section I (Technical Assignment Principles) 6-17-88 and 8-17-88

Section II (Additional Assignment Considerations) 2-1-88 and 3-1-88

Section III (Related Technical Issues) 2-1-88 and 3-1-88

Section IV (Antenna Systems) 6-17-88 and 8-17-88

Thus, the comment period is still open on Sections I and IV of the *Notice of Inquiry*.

[2] *See Report on the Status of the AM Broadcast Rules*, April 3, 1986, p. 24.

[3] *See Petition for Rule Making* (RM-6174), filed on November 6, 1987 by the National Associations for Broadcasters, *Public Notice* No. 895, December 9, 1987. The NRSC is a joint venture between NAB and the Electronic Industries Association (EIA) and is tasked with developing proposals conducive to the improvement of AM radio service.

[4] By "received overlap" we mean the acceptance of interference to the 0.5 mV/m signal contour that normally defines a station's daytime service area. Section 73.37(b) currently allows certain licensees to accept protection of their 1.0 mV/m contour in lieu of the usual 0.5 mV/m contour. This allows some stations to be authorized that would not otherwise be able to conform with the standard signal protection ratios specified in Section 73.37(a).

[5] Section 73.44 currently requires that any emission appearing on a frequency removed from the carrier by between 15 kHz and 30 kHz inclusive, must be attenuated by at least 25 dB below the level of the unmodulated carrier. Emissions removed from the carrier by 30 kHz up to and including 75 kHz must be attenuated at least 35 dB below the level of the unmodulated carrier. Lastly, any emission appearing on a frequency removed from the carrier by more than 75 kHz must be attenuated by at least 43 + 10 Log P (P= transmitter output power in watts) dB below the unmodulated carrier, or 80 dB, whichever is less.

[6] To provide substantial protection to a 30 kHz emitted bandwidth (the 15 kHz modulating bandwidth is radiated more or less symmetrically above and below the station's carrier frequency), station assignments would need to be made in 30 kHz increments.

[7] The protection ratios for the various classes of AM radio stations are listed in Section 73.37(a) of the Rules. Compliance with these ratios is obtained by through one or more of the following methods: controlling the geographic location of the stations relative to one another, by limiting station power, or by requiring the use of directional antennas.

[8] Since emission limitations are relevant only with respect to adjacent channel interference, a discussion of co-channel interference considerations has been omitted here. However, co-channel signal levels also can have a significant effect on the quality of AM service.

[9] A 3 kHz response is similar to that obtained in typical wireline telephone circuits.

[10] The dynamic range of an audio signal may be described as the ratio of the highest amplitude signal to the lowest amplitude signal. In many cases the latter could be the residual "tape hiss" or "surface noise" (in the case of conventional records) when no signal is present. Eliminating the occasionally substantial peaks or transients in program audio permits an increase in the average signal level.

[11] "Pre-emphasis" consists of increasing the amplitude of selected regions of the audio spectrum to compensate for deficiencies in the transmission-reception system. Generally, the higher audio frequencies are pre-emphasized because noise energy is usually greater at higher audio frequencies. Also, many AM broadcasters use high frequency pre-emphasis to "brighten" the sound reproduced at the receiver (*see* paragraph 9, *supra*). The NRSC pre-emphasis standard proposed for use by NAB would boost audio at 2 kHz by about 2.5 dB, at 5 kHz by about 7 dB and at 9.5 kHz about 10 dB, relative to the response below 1 kHz and frequencies above 10 kHz would be severely attenuated (*see*, footnote 13, *infra*).

[12] First adjacent channel stations are those whose carrier frequency is 10 kHz above or below the station to which they are referenced.

[13] *See Interim voluntary national standard, audio standard for AM broadcast stations*, January 10, 1987, National Radio Systems Committee. Basically, under the proposed NRSC standard, the audio is attenuated as follows: -14 dB at 10 kHz; smoothly decreasing to -30 dB at 10.5 kHz; remaining at -30 dB to 11 kHz; -40 dB at 11 kHz; and smoothly decreasing to -50 dB at 15 kHz.

[14] NAB advises in its petition that in excess of 400 AM stations (about 15% of those currently authorized) are now operating pursuant to the NRSC audio pre-emphasis standard.

[15] *See* , *Modulation, Overmodulation and Occupied Bandwidth : Recommendations for the AM Broadcast Industry*, Harrison J. Klein, P.E., in the 41st Annual NAB Engineering Conference Proceedings (1987), p1.

[16] We recognize that the new NRSC emission limitation is still considered interim in nature, and that its final approval by industry could take two more years. However, we consider significant changes in the interim standard unlikely. Any necessary refinements could be handled expeditiously in a subsequent rule making action.

[17] *See Interim voluntary national standard, emission limitation for AM broadcast stations*, September 9, 1987, National Radio Systems Committee.

[18] *See* , Appendix B, proposed NRSC emission limitations.

[19] We note that Section 73.1570(b)(1) of our rules already limits AM transmitter overmodulation. However, we believe adoption of the NRSC emission limitation would give us additional "muscle" in enforcing this provision by allowing an additional citation to be issued to those stations whose overmodulation is severe enough to cause adjacent channel interference.

[20] We understand that a type of "splatter monitor" has just been made available for purchase. It is claimed that this monitor would permit licensees and their consulting engineers to make easy and economical measurements of their transmitted signals for conformance with the NRSC emission limitations. While this monitor is not a complete substitute for an expensive spectrum

analyzer, it may provide an adequate capability for the detection and measurement of spurious emissions. This modulation monitor, which is expected to cost about 2150.00, is described at some length in the comments filed by Delta Electronics, Inc. in response to the NAB petition (RM-6174).

[21] In view of the statement of Klein, cited previously, we believe that adoption of the NRSC emission limitation alone would provide receiver manufacturers with sufficient incentive to develop better quality AM receivers.

[22] The proposed NRSC emission limitations would require that emissions between 10 kHz and 20 kHz be attenuated by 25 dB relative to the unmodulated carrier. Emissions between 20 kHz and 30 kHz would have to be attenuated by at least 35 dB, those emissions between 30 kHz and 60 kHz by at least 5 dB + 1 dB/kHz (removed from carrier), those emissions between 65 and 75 kHz by at least 70 dB, and those above 75 kHz by at least 80 dB below carrier level. We propose that stations be required to comply with these emission limitations beginning January 1, 1990 to coincide with the proposed implementation date suggested for mandatory use of the NRSC audio standard as requested by NAB in its petition. However, this implementation date is possible only if action in response to this *Notice of Proposed Rule Making* is not unduly delayed.

[23] Depending upon the particular circumstances, such as the geographic location and power of the co-channel and adjacent channel stations, a significant increase in the actual service area may be possible. Power increases on the order of 10 dB may be possible in many cases.

[24] We believe the issue of negotiated interference rights is sufficiently complicated and controversial as to warrant its separate treatment in a later phase of this proceeding. Therefore, we intend to defer consideration of any such proposals at this time.

[25] We wish to emphasize that the scope of our proposal in this regard is narrow in that it does not contemplate authorizing an established station to accept interference within the geographic area defined by its existing service contour (normally 0.5 mV/m), if that interference results from a change in another station's facilities.

[26] The change we are proposing herein merely removes some restrictive language in §73.37(b) relating to eligibility and service. It does not change any technical criteria. We solicit comment as to whether we should revise the contour values specified in §73.37(b)(2) and in particular to examine whether higher value contours would be more appropriate. Commenters are also asked to address the desirability of granting waivers of the interference acceptance prohibition under certain conditions, and what criteria the Commission might use in evaluating the requests for such waivers.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 12, 1988

CLARIFICATION OF THE COMMISSION'S RULES PERTAINING TO BROADCAST STATION TRANSMITTER REMOTE CONTROL OPERATION

This Notice is issued in response to the many questions received concerning use of the public switched telephone network for the remote control of broadcast transmitters, and to clarify the Emergency Broadcast System (EBS) equipment and operating requirements when off-premises remote control points are used.

A number of licensees have expressed uncertainty concerning the application of the Commission's remote control rules to telephone "dial-up" systems. The remote control rules are contained in Sections 73.1400 and 73.1410 of our Rules, and were established in MM Docket 84-110. (*See Report and Order*, 49 Fed. Reg. 47608, published Dec. 6, 1984.) In formulating the new remote control rules, we recognized that transmitters had become more reliable, and that advancing technology had created very reliable remote control systems as well. Thus, we intended to lessen the equipment burden on licensees considerably and to provide for the maximum flexibility permitted under the Communications Act of 1934, as amended (Act).

However, flexibility is somewhat limited by the statutory requirement of Section 318 of the Act, which states that a licensed person must be on duty and in charge of the broadcast transmitter apparatus during periods of operation. This obligation is expressed in Section 73.1860 of the Rules, and must apply to all remote control systems. In addition, broadcasters must comply with EBS requirements contained in Sections 73.926 through 73.937, regardless of the transmitter monitoring and control system used. Specific guidelines regarding remote control operation are contained in Section 73.1410. These rules were designed to be general enough so that they would cover all broadcast station transmitter remote control systems, regardless of the method used in performing monitoring and control functions, and to provide a regulatory framework within which broadcasters could design their remote control systems. We do not contemplate specifying all permissible remote control techniques. However, recognizing that it would be beneficial to clarify certain aspects of the remote control rules, particularly with regard to telephone dial-up systems, we believe the public interest would be served through publication of the following twelve guidelines.

1. The FCC does not specify the parameters that must be monitored or adjusted by remote control systems because these can vary from station to station depending on the nature of the facilities. A licensee bears full responsibility both to operate within the terms of the station authorization and all applicable rules. Thus, remote control and monitoring capability must be appropriate to the particular circumstances.

2. Dial-up telephone circuits, dedicated telephone circuits, special remote pickup unit (RPU) cue and control or microwave channels, and other systems are acceptable for metering, adjustments and control of broadcast station operations.

3. Authorized personnel (including the Chief Operator) may obtain technical data and adjust the transmission system by telephone from any location. However, this does not negate the requirement that stations have a designated operator on duty at a fixed position.

4. When a dial-up telephone circuit is used for transmitter remote control, the station licensee must either:

(a) ensure that the dial-up circuit remains available at all times for the exclusive use of the duty operator; or,

(b) provide a means for the operator to interrupt or preempt any other telephone access to the remote control equipment at the transmitter. Alternatively, the station licensee may employ a method, independent of the basic dial-up circuit, which enables the duty operator to turn the transmitter off. Possible methods include, but are not limited to use of interruptions to program audio, a second dial-up circuit, microwave studio-to-transmitter links (STLs), or continuous radio frequency cueing and control circuits.

The duty operator must be in control of the transmitter at all times and the station must be able to meet its EBS responsibilities without delay.

5. Remote control systems that rely, either wholly or in part, on portable paging receivers or mobile telephones to contact the duty operator do not excuse the duty operator from the requirement to be continually present at the fixed remote control location, to have a positive means to interrogate the transmitter, to turn the transmitter off, and to monitor EBS alerts and to carry out EBS functions (if assigned to the duty operator). *See* Sections 73.1860(a) and 73.1410(a).

6. The duty operator can be located at any fixed location and employed in other duties that do not detract from continuous attendance and the ability to respond to operational requirements. For example, a disc jockey can be designated as the duty operator, provided that there is sufficient transmitter monitoring and control equipment in the studio. *See* Section 73.1860(d). Also, EBS responsibilities may limit operator locations. *See* Section 73.932.

7. Duty operators may be employed to supervise more than one station concurrently, provided such additional employment does not hamper their ability to respond to the transmission system operating requirements and the EBS requirements of each station.

8. Automatic alarms and warnings of out-of-tolerance conditions that may result in interference must be directed to the duty operator first. If a corrective response is not received by the remote control master equipment from the duty operator within five minutes, the remote control system must turn the transmitter off automatically. *See* Section 73.1410(e).

9. Automatic alarms, warnings and indications must be unambiguous and of sufficient precision to enable the operator to properly assess an out-of- tolerance condition.

10. The licensee is responsible for ensuring that the remote control system is tested and calibrated as often as is necessary to ensure its proper operation. The test cycle will depend, in part, on the reliability and stability of the equipment used.

11. The licensee has three hours to restore remote monitoring of its operating parameters if its monitoring system fails. If monitoring has not been restored within three hours, either the station must have a duty operator in control of the transmitter at the transmitter site, or the station must shut down. The rules do not specify a certain time by which a licensee must be able to restore remote control capability if such capability is lost, provided that the monitoring system is functioning properly. However, if an out-of-tolerance condition having an interference potential develops and the licensee cannot adjust the transmitter parameters to within the tolerances prescribed in the rules, the station is required to shut down immediately. The ability to turn the transmitter off must be available to the operator at all times, without exception.

12. Regardless of the remote control point in use, each station must comply with EBS requirements, which include the requirement that a staff member monitor the EBS receiver and have the capability to activate the EBS encoder promptly and broadcast EBS tests and emergency action announcements. The transmitter duty operator at a location other than the main studio (off premises) can also be responsible for the station's EBS obligations. That operator must have the monitoring receivers and the facilities needed to transmit the attention signal and make appropriate announcements and programming changes. Additionally, participating stations must have the capability to broadcast national emergency and presidential messages live as they are originated. (Nonparticipating stations are required to leave the air after transmitting the attention signal and the EBS sign-off message.) *See* Sections 73.932 and 73.933 in particular.

Action by the Commission June 8, 1988 by Public Notice. Commissioners Patrick, Chairman; Quello and Dennis.

Mass Media Bureau contact - James E. McNally, Jr., 202-632-9660

FEDERAL COMMUNICATIONS COMMISSION